

## The role of national human rights institutions in the United Nations treaty body process

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Handbook

# The Role of National Human Rights Institutions in the United Nations Treaty Body Process

Amrei Müller

Frauke Seidensticker

## Imprint

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## The Role of National Human Rights Institutions in the United Nations Treaty Body Process

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## Preface

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This handbook examines areas of cooperation between United Nations human rights treaty bodies and national human rights institutions. A review of a broad range of options for complementary activities between monitoring institutions at the national and the international level shows an enormous potential for improved implementation of international human rights law. Most of the examples illustrating manifold areas of cooperation between treaty bodies and national human rights institutions are based on reports by national human rights institutions from all over the world.

Apart from publications and websites of national human rights institutions and from numerous documents by treaty bodies, the authors have drawn inspiration from discussions with the participants of the International Roundtable on the Role of National Human Rights Institutions and Treaty Bodies, held in Berlin in November 2006. Special thanks go to Jane Connors, Petra Follmar-Otto, Morten Kjaerum and Markus Schmidt for their input.

Berlin, December 2007  
German Institute for Human Rights

Prof. Dr. Heiner Bielefeldt  
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## Introduction

A wide range of universal human rights norms has been codified by the United Nations over the past fifty years. Seven core human rights treaties have been ratified by a large number of states with different political, cultural, social and economic backgrounds, and a number of substantive and procedural protocols have been formulated and entered into force. At the 1993 Vienna World Conference on Human Rights, states recognised once and for all that all human rights are universal, indivisible, interdependent and interrelated. States also accepted the establishment of international institutions to supervise their compliance with international human rights law (IHRL). Thus, the protection of human rights has become a legitimate concern of the international community.

In recent years, however, it has been recognised that the formidable gap that still exists "between the lofty rhetoric of human rights in the halls of the United Nations, and its sobering realities on the ground" can be closed only if all actors involved in human rights work strongly focus their attention on the implementation of international human rights law.<sup>1</sup> Greater cooperation among and integration of national and international institutions with mandates to promote and protect human rights has been recognised as one central response to the "implementation crisis".

While implementation is foremost the responsibility of the states signing and ratifying or acceding to a human rights treaty, the eight UN human rights treaty bodies (TBs) that are in operation today and national human rights institutions (NHRIs) play a key role in supporting and monitoring implementation. They should, therefore, expand their cooperation. Within the framework of the human rights treaty reporting process, TBs issue their "Concluding Observations" or "Concluding Com-

ments" in which they make suggestions to governments on how to implement better the respective treaty provisions in their countries. From the other angle, NHRIs have a mandate to monitor their governments' compliance with IHRL, including their compliance with the UN TBs' Concluding Observations. Effective cooperation between UN TBs and NHRIs can, therefore, greatly contribute to an enhanced implementation of IHRL at the national level.

Recent human rights treaties like the Optional Protocol to the Convention Against Torture (OP-CAT), the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) explicitly reflect the insight that greater integration and linking up of human rights institutions at the national and international level is necessary for the actual implementation of IHRL. OP-CAT and art. 33 of the CRPD require states to establish effective mechanisms at the national level that are responsible for monitoring the implementation of these two new international human rights treaties.

Despite agreement that enhanced cooperation between UN TBs and NHRIs could greatly contribute to better implementation of IHRL, interaction between NHRIs and UN TBs has not been systematic, and existing interaction has not been reviewed and evaluated properly. This handbook, therefore, aims to examine existing cooperation between the seven UN TBs – eight including the Subcommission on Prevention, working on a mandate based on the OP-CAT – and NHRIs, and to develop and discuss ideas about how such interaction can be strengthened and expanded.

The information compiled in this handbook is also intended to assist NHRIs and UN TBs to structure their cooperation with regard to all aspects of the UN human rights monitoring process. It is hoped that it will be useful for NHRIs to understand better the functioning of the treaty monitoring process and how to get involved in this process, and for TBs to better understand the role that NHRIs can reasonably play in this process.

<sup>1</sup> OHCHR (2005): Plan of Action submitted by the United Nations High Commissioner for Human Rights. UN Doc. A/59/2005/Add. 3, 26 May 2005, paras. 43–45 and para. 47.

## What You Can Find in This Handbook

The handbook is divided into four chapters. In the first chapter the various mechanisms of the UN TB system are explained. This includes the state reporting process before the TBs, the individual complaints procedures, and the inquiry procedures. It also incorporates sub-sections about the new procedures under OP-CAT, about the innovations of the recently adopted CRPD and ICPED, and about the state of the debate on reform of the UN TB system. In the second chapter, the main functions of NHRIs are summarised. Building upon the information given in chapters 1 and 2, chapter 3 reviews existing cooperation between NHRIs and TBs, and discusses ways in which such cooperation can be expanded and strengthened. The handbook closes with a conclusion in chapter 4, summarizing current debates between TBs and NHRIs on their present and future collaboration.

The handbook is designed to be of immediate practical value for NHRIs that wish to increase their interaction with TBs. It includes text boxes providing examples of good practice in interaction between NHRIs and TBs, in most cases based on activities of accredited NHRI, in some cases on ombudsman institutions that could serve as an inspiration for NHRIs.

The information given in this handbook is drawn from documents of the eight UN TBs (Annual Reports, Concluding Observations, General Comments, Views, Working Methods, Rules of Procedure, and documents adopted by the Inter-Committee Meetings/ Meetings of Chairpersons of these bodies), discussions and papers that were made available at the Conference on the Role of National Human Rights Institutions in the Treaty Body Process held in Berlin in November 2006, documents and reports issued by various NHRIs, and relevant academic literature. However, not every existing practice of the TBs is documented, and every TB has developed a slightly different way of cooperating with NHRIs. In addition, interaction with the TBs will look different from each national context. Finally, these modes of interaction are continuously developing and changing.

## 1 UN Human Rights Treaties and Their Monitoring Mechanisms

### 1.1 The UN Human Rights Treaties

As of December 2007, seven core UN human rights treaties had entered into force (plus associated optional protocols):

1. The International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR),
2. The International Covenant on Civil and Political Rights of 1966 (ICCPR) and its two Optional Protocols (ICCPR-OP1; ICCPR-OP2),
3. The Convention on the Elimination of All Forms of Racial Discrimination of 1965 (ICERD),
4. The Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW) and the Optional Protocol thereto (OP-CEDAW),
5. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT) and the Optional Protocol thereto (OP-CAT),
6. The Convention on the Rights of the Child of 1989 (CRC) and its two Optional Protocols (OP-CRC-AC; OP-CRC-SC), and
7. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990 (ICRMW).

Two other international conventions are in the process of coming into force: the International Convention for the Protection of all Persons from Enforced Disappearance (ICPED) was opened for signature, ratification and accession on 6 February 2007, and will enter into force after twenty countries have ratified or acceded to it; the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol were opened for signature, ratification and accession on 30 March 2007. The CRPD will also enter into force when twenty countries have ratified or acceded to it, the Optional Protocol will need ten ratifications to come into force.<sup>2</sup>

<sup>2</sup> All treaties and their optional protocols are accessible on the OHCHR's website: <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>

The two new international conventions and all but one of the core treaties contain a provision for the establishment of a treaty body that is mandated to monitor the implementation of the respective treaty.<sup>3</sup> Each TB is composed of ten to twenty-three experts who are elected for the duration of four years by the states that are party to the respective treaty. They serve as independent experts on an honorary or voluntary basis.<sup>4</sup>

## 1.2 The Reporting Procedures

The seven core UN human rights treaties currently in force and the two new conventions provide for states parties to report to the respective TB on the implementation of the treaty at the national level.<sup>5</sup> Under art. 18 CEDAW, art. 9 ICERD, and art. 73 ICRMW states parties are asked to report on "legislative, judicial, administrative or other measures" adopted to implement the treaties, while the other conventions require states to report on "measures" states have taken to achieve observance of the rights enshrined in the respective treaty without specifying more closely which measures. Some treaties call on states to report on "factors and difficulties" affecting the implementation of the treaty.<sup>6</sup> Finally, a state report should report any "progress" achieved in relation to the observance of the rights enshrined in the treaty. Reporting allows states to conduct a comprehensive self-evaluation concerning the progressive realisation of the rights contained in the treaties.

3 The Human Rights Committee (HRCttee) monitors the implementation of the ICCPR (art. 28 ICCPR); the Committee on Economic, Social and Cultural Rights (CESCR) monitors the implementation of the ICESCR; the Committee on the Elimination of Racial Discrimination (CERD) monitors the implementation of ICERD (art. 8 ICERD); the Committee on the Elimination of Discrimination against Women (CEDAW) monitors the implementation of CEDAW (art. 17 (1) CEDAW); the Committee against Torture (CAT) monitors the implementation of CAT (art. 17 (1) CAT); the Committee on the Rights of the Child (CRC) monitors the implementation of CRC (art. 43 (1) CRC); and the Committee on Migrant Workers (CMW) monitors the implementation of ICRMW (art. 72 (1) ICRMW). Regarding the two new international human rights conventions, art. 34 (1) CRPD provides for the establishment of the Committee on the Rights of Persons with Disabilities and art. 26 ICPED provides for the establishment of a Committee on Enforced Disappearances.

4 The only (formal) exception is the CESCR art. 16 (2) ICESCR provides for the states parties to report to the UN Secretary-General, who will pass copies to the Economic and Social Council (ECOSOC) for consideration. ECOSOC established a working group to assist in the consideration of reports. In 1987 this group was reconstituted in accordance with the treaty body model (see ECOSOC resolution 1985/17). However, the experts of the CESCR are elected by ECOSOC.

5 See art. 40 ICCPR, arts. 16/17 ICESCR, art. 9 ICERD, art. 18 CEDAW, art. 19 CAT, art. 44 CRC, art. 73 ICRMW, art. 35 (1) CRPD and art. 29 ICPED.

6 See, for example, art. 40 (2) ICCPR, art. 18 (2) CEDAW and art. 35 (5) CRPD.

## Reporting Obligations

States are obliged to present an initial report to the respective TBs, usually within one year after the relevant treaty has entered into force for the state party concerned. Subsequently, reports are to be submitted periodically at intervals determined by the treaty itself or by the TB. Most committees decided on an interval of four or five years, and set the date by which the next periodic report is due in the last paragraph of their Concluding Observations to a state report.

All reports to all committees are composed of two parts. The first part of each report is the "common core document". It includes demographic, geographic, legal, political, economic, social and other basic information on the country, and should be updated whenever major changes occur in the country.<sup>7</sup>

All committees provide general guidelines on the requirements for the second part of the reports, the treaty-specific document.<sup>8</sup> The treaty-specific documents have to cover all substantive articles of the treaty, including information on the state's constitutional and legal framework that is not provided in the common core document, as well as the legal and practical measures taken in order to implement the treaty. Where CEDAW is concerned, the current guidelines recommend that, in addition, countries should refer not only to "mere lists of legal instruments adopted in the country concerned in recent years" but that they should also report on "the practical realisation" of the "principle of the equality of men and women".<sup>9</sup> CEDAW's reporting guidelines also demand the explanation of "factors and difficulties affecting the degree of fulfilment of obligations under the Convention" and of "the nature and extent of, and reasons for every such factor and difficulty, ... and should give details of the steps being taken to overcome them".<sup>10</sup> Even more details on the practical realisation of rights are expected by CESCR, which asks for, among other things,

7 Harmonised guidelines on the "common core document" were adopted by the Fifth Inter-Committee Meeting of the human rights treaty bodies. Cf.: 5th Inter-Committee Meeting / 18th Meeting of Chairpersons of the Human Rights Treaty Bodies (2006): Harmonised Guidelines on Reporting under the International Human Rights Treaties, Including Guidelines on a Common Core Document and Treaty-specific Documents. UN Doc. HRI/MC/2006/3, 10 May 2006. States have been encouraged to use these guidelines.

8 For a recent compilation of these reporting guidelines see Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to International Human Rights Treaties, UN Doc. HRI/GEN/2/Rev. 4, 21 May 2007.

9 Art. 2 CEDAW.

10 Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to International Human Rights Treaties, UN Doc. HRI/GEN/2/Rev. 4, 21 May 2007, para. C. 3, p. 63.



"information on the situation, level and trends of employment, unemployment and underemployment."<sup>11</sup>

Within the framework of the TBs' efforts to make the state reporting system more effective and transparent, TBs have reviewed their reporting guidelines in light of the "Harmonised guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents", or are in the process of so doing.<sup>12</sup>

It is of great importance for TBs to have sufficient information to consider the implementation of the respective treaty within a specific country effectively. Therefore, TBs welcome information from other sources that supplements the states' reports. The media plays an important role here, but even more important is the information provided by NGOs, NHRIs, other UN organs and specialised UN agencies. Today, reports submitted by NGOs form a key part of the reporting system, and all committees have developed mechanisms whereby they can be briefed by NGOs.

### Consideration of State Reports

States parties' reports are considered by the TBs in a public session. Among other things, this serves the purpose of external monitoring of the human rights situation within a specific country, and the purpose of common targeted goal setting by the TB and the state party.

The examination of the reports proceeds in several steps. Once reports have been delivered and distributed among committee members, most committees develop a "list of issues" presented to the government in advance of public examination of the report. Most TBs designate one or two country rapporteurs who have prime responsibility for developing the "list of issues" for a specific country.<sup>13</sup> The "list of issues" highlights the major concerns of the relevant committee regarding the implementation of its treaty in the country under examination. It contains a series of specific requests for clarification on the content of the state report, but also on issues still unanswered from the examination of previous reports. Some committees

<sup>11</sup> Ibid., para. 9 (a), 27.

<sup>12</sup> 5th Inter-Committee Meeting / 18th Meeting of Chairpersons of the Human Rights Treaty Bodies (2006): Harmonized Guidelines on Reporting under the International Human Rights Treaties, Including Guidelines on a Common Core Document and Treaty-specific Documents. UN Doc. HRI/MC/2006/3, 10 May 2006.

<sup>13</sup> Except in the case of CEDAW, HRCttee and CERD, the identity of the country rapporteurs is public.

use the list of issues to structure the dialogue between the state party delegation and the TB members, and to give it a principal focus. The document is usually discussed, supplemented and approved by pre-sessional working groups or in-session task forces of the committees or by the entire committees.<sup>14</sup> Governments then prepare the meeting with the committees on the basis of this list, either by providing answers in writing or by preparing an oral presentation for the meetings.<sup>15</sup> The consideration itself lasts six hours on average and takes place as "constructive dialogue". This notion was adopted to stress the non-confrontational nature of the dialogue, which primarily aims to assisting the state party with the implementation of human rights. The state party delegation may present the report according to its priorities before it answers the questions raised by the experts.

The outcome of the consideration of all committees are called "Concluding Observations" or "Concluding Comments" (the latter expression being used by the CEDAW). The Concluding Observations are usually drafted by the country rapporteurs, discussed, complemented and adopted by the committees in closed session, and presented to the respective state party in writing. They all follow the same broad structure: an introduction where the committees emphasize positive aspects of the report and related developments in the country is followed by a part on areas of concern which are matched by recommendations for remedial action.

On a more abstract level, conclusions are consolidated into so called "General Comments", TBs' interpretation of the content of human rights provisions. These are the most important source for states parties and other actors to draw on to fully understand the substance of the provisions of the different human treaties.<sup>16</sup>

<sup>14</sup> The CRC, the CESC, and the CEDAW have established such pre-sessional working groups. They meet around five days prior to the actual sessions of the committees, and are usually composed of five members of the committee. Logically, the country rapporteur who drafted the list of issues is a member of the pre-sessional working group. The HRCttee has changed its procedure slightly, replacing the pre-sessional working group with a Country Report Task Force which meets during the plenary sessions. It consists of four to six members of the HRCttee and also discusses and adopts the list of issues drafted by the country rapporteur. The members of the Country Task Force then take the lead in conducting the debate with the state party's representative.

The pre-sessional working group of the CAT consists of the whole committee. It has the same functions as the other pre-sessional working groups. The CERD does not convene a pre-sessional working group. Lists of issues are elaborated by the country rapporteur at his/her discretion.

<sup>15</sup> The CEDAW, the CESC, the CRC, and the CMW require states to respond in writing to the questions posed in the list of issues. The HRCttee and the CAT encourage states to do the same.

<sup>16</sup> Some committees, such as the CAT, have begun to invite NHRIs to workshops on the draft of General Comments. Oral interview with Conrado Martinez, Guatemala Human Rights Commission, 26 November 2007.

## Addressing Non-Compliance of States Parties with their Reporting Obligations

TBs often express concern about the considerable number of overdue reports.<sup>17</sup> States' failure to report greatly hinders the TBs' performance of their monitoring functions. Committees send reminders to states whose reports are significantly overdue and publish a list of non-reporting states in their annual reports.

TBs have also adopted procedures for states that don't follow their reporting obligations over a long period of time. Apart from the CMW, all TBs have started examining measures adopted by states with the view to implementing the provisions of the respective treaties, even in the absence of a report. States parties are notified about the TBs' intention to conduct such examination based on information available to them from other sources.<sup>18</sup> Committees then transmit provisional Concluding Observations to the respective states parties, and request states to address these provisional Concluding Observations in their next periodic report.

## Follow-up to Concluding Observations

Several committees have also increased efforts to continue the "constructive dialogue" with the state party and civil society after the Concluding Observations have been sent to the state party. Most committees have developed follow-up procedures whereby they ask state parties to submit specific information on how they have addressed priority issues identified in the committees' Concluding Observations within a given timeframe, mostly a year after the session at which the report was considered.<sup>19</sup> Others ask state parties to include information on their efforts to implement Concluding Observations in the next periodic report.<sup>20</sup> In addition, TBs note in their Concluding Observations whether the Concluding Observations of the previous session have been implemented by the state parties.<sup>21</sup>

The HRCtee, CERD and CAT also appoint rapporteurs/coordinators for the follow-up to the Concluding Observations. The follow-up rapporteurs send reminders to

state parties that don't submit follow-up responses in time or send incomplete responses, they meet and consult with permanent representatives of states parties in Geneva or New York, they sometimes suggest to states parties that they should request technical assistance from the OHCHR in respect of implementation of the Concluding Observations, and they can make recommendations for other appropriate action to the committees when states fall short of implementing Concluding Observations.<sup>22</sup> The CERD's follow-up coordinator has been invited to conduct follow-up visits to several states parties to discuss and assess the measures taken to implement the CERD's Concluding Observations. The CRC does not have a formal follow-up procedure because of its very heavy workload but regularly holds regional follow-up workshops on the implementation of Concluding Observations for states parties.

## 1.3 The Individual Complaints Procedures

The individual complaints procedures at the international level complement effective remedies for victims of human rights violations at the national level. TBs' views on individual complaints further develop and fine-tune IHRL, and ensure that human rights are interpreted consistently in a constantly changing world. The body of jurisprudence developed through the consideration of complaints draws attention to specific human rights violations, makes victims more visible, and suggests concrete remedies. Decisions of international bodies on individual cases can guide state agencies, international governmental and non-governmental organisations, NHRIs and individuals on the interpretation of IHRL.

Art. 14 ICERD, art. 22 CAT, art. 77 ICRMW, ICCPR-OP1 and OP-CEDAW provide for an optional individual complaints procedure.<sup>23</sup> Another Optional Protocol is currently being developed to the ICESCR. The OP to the CRPD and art. 31(1) ICPEP also envisage individual complaints procedures, but these have not yet entered into force. States have to explicitly accept these procedures, by way of declaration under the relevant articles or ratification of the relevant optional protocols.

<sup>17</sup> For a recent list of overdue reports see: OHCHR (2006): Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body. UN Doc. HRI/MC/2006/2, 22 March 2006, Annex 1: Facts and Figures about Reporting.

<sup>18</sup> This information can come from other UN bodies or specialised agencies, NGOs or NHRIs.

<sup>19</sup> This is established practice of the HRCtee, CAT, CERD and CESCR.

<sup>20</sup> This is the practice of the CEDAW. This approach is also taken in the few Concluding Observations that have so far been adopted by the CMW.

<sup>21</sup> This follow-up method is used in particular by the CRC.

<sup>22</sup> CERD recently even adopted "Terms of Reference for the Work of the Coordinator on Follow-up to the Observations and Recommendations of the CERD under art. 9 (1) ICERD", in: CERD (2006): Annual Report of the CERD. Official Records of the General Assembly, 60th session, Supplement No. 18, UN Doc. A/60/80, Annex IV, 2006. CESCR is currently considering appointing a follow-up rapporteur for its Concluding Observations as well.

<sup>23</sup> The ICRMW's provisions for individual communications will become operative only after ten states have made the necessary declaration under art. 77 ICRMW, which is not yet the case.

## Admissibility Criteria

Under the individual complaints procedures, an individual who claims to be a victim of a violation of one of the rights set out in the treaties can submit a "communication" or petition to the relevant committee.<sup>24</sup> Several preconditions must be met before a communication can be considered by the committee concerned: the state concerned must have accepted the relevant provisions in the respective treaty or ratified the Optional Protocol and recognised the competence of the committee to consider individual complaints.

The communication must be compatible with the provisions of the convention in question (*ratione temporis, personae, loci, materiae*), and must be sufficiently substantiated,<sup>25</sup> the complainant must have exhausted available and effective domestic remedies,<sup>26</sup> the issue should not be under examination by another international procedure of investigation or settlement,<sup>27</sup> anonymous communications cannot be admitted,<sup>28</sup> and the complaint must not constitute an abuse of the right to complain.

TBs also accept complaints that are brought on behalf of a third person, provided this person's written consent has been obtained or if the author can justify the lack of consent (e.g. it is impractical to gain that consent). Admissibility may also be affected by any reservation the state party may have made to the treaty or the protocol.

The communication does not need to take any particular form. Nevertheless, model complaint forms are available on the website of the OHCHR, which help individuals to reasonably structure their complaints, and make sure that all necessary information is provided to the committees. This is very important, because the procedures are based exclusively on written information. Individuals submit their complaints to the OHCHR in Geneva.<sup>29</sup>

<sup>24</sup> Legal entities can generally not submit a complaint. However, art. 14 ICERD and art. 2 OP-CEDAW recognise the right of groups of individuals to submit a complaint.

<sup>25</sup> Cf.: art. 3 OPI ICCPR; art. 4 OP-CEDAW; art. 22 (2) CAT; art. 77 (2) ICRMW; art.31 (2) (b) ICPED; and art. 2 (b) and (e) OP -CRPD.

<sup>26</sup> Art. 2 and 5 (2) (b) OPI ICCPR; art. 4 OP-CEDAW; art. 22 (5) (b) CAT; art.14 (6) (a) ICERD. It is important to note that complaints to CERD must be submitted within six months of the final decision by a national authority in the case (art. 14 (5) ICERD); art. 77 (3) (b) ICRMW; art. 31 (2) (d) ICPED; and art. 2(d) OP to CRPD.

<sup>27</sup> Art. 5 (2) (a) OPI ICCPR; art. 4 CEDAW; art. 22 (5) (a) CAT; art. 77 (3) (a) ICRMW; art. 31 (2) (c) ICPED; and art. 2 (c) OP - CRPD.

<sup>28</sup> Art. 3 OPI ICCPR; art. 3 CEDAW; art. 22 (2) CAT; art.14 (6) (a) ICERD; art. 77 (2) ICRMW; art. 31 (2) (a) ICPED; and art. 2 (a) OP to CRPD.

<sup>29</sup> Contact details can be found on the website of the OHCHR, [www.ohchr.org](http://www.ohchr.org).

## The Procedures before the Committees

Under the rules of procedure of the HRCtee, CAT and CEDAW, new communications are processed by a Special Rapporteur on New Communications and Interim Measures or by a working group. CERD is the only committee with an individual complaints mechanism that does not have a similar institution. The Special Rapporteurs on New Communications transmit the complaints to the states parties concerned, with the request for information or observations relevant to the questions of admissibility and the merits. If they consider that the case is *ab initio* inadmissible on procedural grounds, they can also directly recommend to the committee plenary to declare the case inadmissible. The Special Rapporteurs on New Communications can also request the state to take interim measures deemed necessary to avoid irreparable harm to the victim of the alleged violation – this does not predetermine the outcome regarding the merits of the communication. States' compliance with interim measures is monitored by the Special Rapporteurs on New Communications and Interim Measures.

States concerned are then asked to submit their comments on the complaints within a specific period of time (within six months under the rules of procedure of the HRCtee, the CAT and the CEDAW, and within three months under the procedures of CERD). Once the state has made its submission, the complainant has the opportunity to respond to the state's comments, again within a certain timeframe (within two months under the procedure of the HRCtee, within six weeks under CAT and ICERD, and CEDAW decides on the timeframe for each case individually). Generally, third party or *amicus curiae* interventions are not permitted under the procedures, but NHRIs and NGOs occasionally submit material relevant to the complaint through the complainant. Afterwards, the case is ready to be considered by the relevant TB in a closed meeting. Except for the final decisions of the committees ("Views" for the HRCtee and CAT; "Opinions" for CERD), all documents concerning individual communications are confidential.

The procedure may be split into examination of admissibility and examination of the merits, but the TBs generally prefer to deal with both aspects simultaneously, to save time. Recommendations on the admissibility of a complaint and the merits are prepared by a working group on communications which is established by each committee that deals with individual complaints.

After consideration of the case, the TBs issue their "Views" or "Opinions" in which they explain their decision on the admissibility of the case, and establish whether the rights of the complainant have been violated or not. The TBs also consider com-

plaints when a state has not replied to the TB's request to comment on the complaint within the required timeframe. If a committee finds a violation by states parties, the Views frequently contain appropriate recommendations for reparation, and invite the state to supply information within two to three months on the steps it has taken to give effect to the committee's findings.

The committee's decisions are formulated as views; they are recommendations rather than legally binding judgements and do not include an appeal procedure. States are nevertheless expected to follow the Views issued by TBs; after all, they have agreed to an individual complaints procedure that only makes any sense if they take the TBs' Views seriously.

### Follow-up to Views

All the treaty bodies have now established procedures for following up decisions, to facilitate their implementation. If a state fails to take appropriate steps to implement the committee's recommendations, the case is referred to a Special Rapporteur for Follow-up on Views who considers what further measures should be taken. For example, the Special Rapporteur may issue specific requests to the state party, they may meet with a state's representatives to discuss the action taken, and they can make recommendations to the committee to take further action that is necessary to implement the committee's recommendations. The Special Rapporteur for the Follow-up on Views of CAT and the HRCtee may also, with the respective committee's approval, undertake follow-up visits to states parties in connection with the implementation of Views.

Unless the follow-up information is suppressed (in exceptional circumstances), it is published together with the action taken by the Special Rapporteur in a special follow-up chapter of the committee's annual report. CEDAW and CERD also appoint rapporteurs to follow up their Views, which may recommend further action "as may be appropriate" to secure the implementation of their Views.

Generally, the individual complaint procedures under the Optional Protocols to the ICCPR and CEDAW, under art. 22 CAT and especially under art. 14 ICERD are not well known and are therefore underutilised. Few states that accept individual complaints publicise the availability of the procedures at the national level. Considerably fewer states are party to the Optional Protocols to the ICCPR and CEDAW,

than to the ICCPR and CEDAW themselves.<sup>30</sup> Of 146 states that are party to CAT only 61 have accepted CAT's competence to consider individual complaints under art. 22 CAT, and only 49 of 173 states party to ICERD accepted the individual complaint procedure under ICERD.<sup>31</sup> Even in countries that have accepted the various individual complaint procedures they are not used frequently.

## 1.4 The Inquiry Procedures

Under art. 20 CAT and art. 8 OP-CEDAW, CAT and CEDAW may conduct inquiries if they have received reliable information of systematic violations of rights set out in the conventions. So far the inquiry procedure has been used seven times by the CAT, CEDAW completed only one inquiry (regarding Mexico in July 2004). Once it has been established, the Committee on the Rights of Persons with Disabilities will also have the power to conduct inquiries under OP-CRPD.<sup>32</sup> Under art. 33 ICPED, the Committee on Enforced Disappearances can, with the consent of the state party, undertake a visit to the territory of a state party concerned and – if it receives reliable information indicating that a state party is seriously violating the provisions of ICPED – report back to the committee.<sup>33</sup>

In contrast to individual complaint procedures that are concerned with specific human rights violations of an individual (or, exceptionally, of a group), the inquiry procedures aim at addressing systematic violations of human rights at the national level. They do not require the exhaustion of domestic remedies. States which have ratified CAT or OP-CEDAW may, however, opt out of the inquiry procedure by making a declaration under art. 28 CAT or art. 10 OP-CEDAW at the time of ratification or accession to these instruments.<sup>34</sup>

<sup>30</sup> Currently, the ICCPR has been ratified by 161 states while OP-1 to the ICCPR has been ratified by 109 states. Of the 184 states currently party to CEDAW, 87 have also ratified the Optional Protocol. For an updated list of ratifications see <http://www.rwi.lu.se/tm/ThemeMaps.html> [accessed 27 August 2007].

<sup>31</sup> See <http://www.rwi.lu.se/tm/ThemeMaps.html> [accessed 27 August 2007].

<sup>32</sup> Cf. art. 6 OP-CRPD.

<sup>33</sup> Like CRPD and its Optional Protocol, ICPED has not yet entered into force.

<sup>34</sup> Art. 8 OP-CRPD also allows states to opt out of the inquiry procedures under CRPD.

## The Procedures before the CAT and CEDAW

The CAT can initiate an inquiry procedure based on "reliable information" which "appears to it to contain well-founded indications that torture is being systematically practised in the territory of a state party".<sup>35</sup> An inquiry is, accordingly, only generated if systematic torture is alleged, but not for practices of other cruel, inhuman or degrading treatment or punishment. In the case of CEDAW, the information available to the committee should indicate "grave or systematic violations of the rights set forth in the Convention by a State party".<sup>36</sup> Information initiating an inquiry is usually submitted to the Committees by NGOs.

Since the whole procedure is confidential and requires the committees to seek the state's consent throughout, the committees invite the states parties to cooperate with them and to submit observations on the information received. The committees may also ask for additional information from NGOs, individuals, NHRIs, and UN bodies or specialised UN agencies.

On the basis of the information received, a committee can appoint one or more of its members to make a confidential inquiry. Under CEDAW's procedures, committee members may visit the territory of the state party where "warranted and with the consent of the State Party";<sup>37</sup> the CAT also allows for such country visits.<sup>38</sup> The outcome of an inquiry is reported back to the committee for examination. The committee develops comments and recommendations which are transmitted to the state party.

## Follow-up to Recommendations

CAT and CEDAW ask states to inform them ("within a reasonable delay" and within six months, respectively) to respond to their findings and recommendations, and to give information on the action taken to give effect to these recommendations.<sup>39</sup>

<sup>35</sup> Art. 20 (1) CAT. In its conclusions to its first inquiry procedure, the CAT clarified what constitutes systematic practices of torture within a state party. See CAT (2003): Annual Report of the Committee against Torture. Official Records of the General Assembly, 58th Session, Supplement No. 44, Add.1, UN Doc. A/58/44/Add.1, 2003, para. 39.

<sup>36</sup> Art. 8 OP-CEDAW.

<sup>37</sup> Art. 8 OP-CEDAW.

<sup>38</sup> Art. 20 (3) CAT; and CAT (2002): Rules of Procedure of the Committee against Torture. UN Doc. CAT/C/3/Rev. 4, 9 August 2002, rule 80.

<sup>39</sup> CAT: *ibid.*, rule 83 (2), CEDAW: art. 9 OP-CEDAW.

CAT also appointed a Special Rapporteur under art. 20 CAT who, *inter alia*, engages in follow-up activities that aim to encourage states parties to implement recommendations. Both committees can, after consultation with the state party, include their findings and recommendations from an inquiry procedure in their annual reports to the General Assembly.

## 1.5 The Optional Protocol to the Convention Against Torture (OP-CAT)

OP-CAT, entered into force in 2006, creates innovative mechanisms to enhance prevention of torture and other cruel, inhuman or degrading treatment or punishment.<sup>40</sup> It establishes the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (herein-after referred to as the Subcommittee on Prevention or just Subcommittee). Secondly, every state party should have in place one or more independent mechanisms empowered under national law to prevent torture through unannounced visits to any place of detention and other forms of monitoring, the so-called National Preventive Mechanism NPM. So OP-CAT clearly reflects the insight that effective implementation of international human rights instruments can be enhanced greatly when international and national mechanisms for the prevention of torture work as a two pillar system. Through establishing a system of cooperation between international and national independent oversight mechanisms, OP-CAT aims to prevent any forms of torture and ill-treatment by systematic monitoring, even of isolated places of detention.

## The Subcommittee on Prevention

The Subcommittee on Prevention is authorised to visit places where people are deprived of their liberty (as defined in art. 4 OP-CAT, deprivation of liberty means here any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority) and to make recommendations to states parties concerning how persons deprived of their liberty can be protected against torture and other cruel, inhuman or degrading treatment or punishment. It consists of ten international independent experts who are elected by the

<sup>40</sup> OP-CAT entered into force on 22 June 2006.

parties to the OP-CAT, to be increased to 25 after the 50th ratification or accession.<sup>41</sup> To carry out its mandate, the Subcommittee has, among other things, the right to access without restriction all places of detention and their installations and facilities, all information referring to the treatment of persons deprived of their liberty as well as information on their conditions of detention, the right to move freely, and the right to interview persons deprived of their liberty without witnesses.<sup>42</sup>

After a country visit has been conducted by the Subcommittee on Prevention, it will issue recommendations to the state party. Recommendations are meant to enhance the protection of detainees from torture and other forms of ill-treatment. States are then expected to enter into a dialogue with the Subcommittee regarding possible implementation measures.<sup>43</sup> These recommendations are confidentially communicated to the state party, and can be submitted to the NPM as well.<sup>44</sup> Art. 13 (4) OP-CAT allows the Subcommittee to decide that a short follow-up visit is necessary to make sure that the state party has implemented or is in the process of implementing the Subcommittee's recommendations. OP-CAT also contains a sanction for non-compliance with the Subcommittee's recommendations: the CAT may decide by majority vote to issue a public statement on the non-compliance of the state party if the Subcommittee so requests.<sup>45</sup> Reports of the Subcommittee can be made public with the consent of the state party concerned.

The first members of the Subcommittee were elected in December 2006. It met three times in 2007 and also conducted its first two visits, to Mauritius and the Maldives. Visits to Sweden and Paraguay are scheduled for 2008.

### The National Preventive Mechanism (NPM)

At the national level, state parties to OP-CAT are required to establish one or more suitable "national preventive mechanisms" (NPM) within one year after they have ratified the Protocol.<sup>46</sup> Together, the Subcommittee on Prevention and the NPM will build a complementary "system of regular visits" to places where people are deprived of their liberty to expose these places to greater public scrutiny.<sup>47</sup> Since effective

<sup>41</sup> See art. 5 (1) OP-CAT

<sup>42</sup> Art. 14 (1) OP-CAT

<sup>43</sup> Art. 12 (d) OP-CAT.

<sup>44</sup> Art. 16 (1) OP-CAT.

<sup>45</sup> Art. 16 (4) OP-CAT.

<sup>46</sup> Art. 17 OP-CAT

<sup>47</sup> Art. 1 OP-CAT

work by the NPMs depends on a good cooperative relationship with the Subcommittee on Prevention, the NPMs have the right to meet with, send and exchange information, and to directly (if necessary confidentially) contact the Subcommittee.<sup>48</sup> The Subcommittee can also offer training and technical assistance to the NPMs with the aim of enhancing their capacity.<sup>49</sup> States are required to encourage and facilitate communication and contacts between their NPMs and the Subcommittee.<sup>50</sup> NPMs are currently being designated by states parties.

While states parties are generally free to determine the exact shape of their NPM or NPMs, the Optional Protocol formulates certain criteria which have to be fulfilled to allow the NPMs to carry out their function independently to the full extent.<sup>51</sup>

- As per art. 19 OP-CAT, NPMs shall be mandated to (a) regularly examine the treatment of persons deprived of their liberty in places of detention; (b) make recommendations to the relevant authorities with the aim of improving the treatment and conditions of detainees and preventing torture and other cruel, inhuman or degrading treatment or punishment; and (c) submit proposals and observations concerning existing or draft legislation;
- Art. 18 (2) OP-CAT requires that members of the NPMs possess the "required capabilities and professional knowledge"; also, states parties must "strive for a gender balance and the adequate representation of ethnic and minority groups in the country," when deciding on the membership of the NPM;
- NPMs must be independent (art. 17 OP-CAT). This includes "functional" and "personal" independence (art. 18 (1) OP-CAT).
- NPMs must have access to all places of detention, to all persons deprived of their liberty, and to all relevant information concerning these persons. The NPMs must also have the right to have private interviews with persons deprived of their liberty without witnesses, and conduct visits to places of detention on a regular basis (art. 20 OP-CAT);
- Pursuant to art. 22 OP-CAT, NPMs have the right to follow-up on their recommendations to competent authorities: States parties are required to enter into a dialogue with the NPMs regarding the implementation of the NPM's recommendations;

<sup>48</sup> Art. 20 (f), art. 11 (b) (ii) and art. 16 (1) OP-CAT.

<sup>49</sup> Art. 11 (1) (b) (ii) OP-CAT

<sup>50</sup> Art. 12 (c) OP-CAT.

<sup>51</sup> For more details on these criteria see: Association for the Prevention of Torture (APT) (2006): Establishment and Designation of National Preventive Mechanisms. Available at: <http://www.ap.t.ch/content/view/44/84/lang,en/>; and Suntinger, Walter (2007): National Präventionsmechanismen – Kategorien und Bewertung, in: Deutsches Institut für Menschenrechte (ed.) (2007): Prävention von Folter und Misshandlung in Deutschland. Baden-Baden: Nomos, p. 27–53.



- Art. 18 (3) OP-CAT require states to make available the necessary resources for the functioning of the NPMs;
- Persons cooperating with NPMs must be protected against any sanctions or other harm (art. 21 (1) OP-CAT);
- Art. 23 OP-CAT requires states to publish and disseminate the annual reports of the NPMs.

In art. 18 (4), OP-CAT refers to the Paris Principles as a set of standards that should be taken into consideration for the NPM which underlines the importance of their independence and adequate funding. The type and number of NPMs that are to be established within a particular state party will largely depend on the nature of pre-existing bodies. The OP-CAT's reference to the Paris Principles may encourage states parties to consider establishing their NPM within or connected to an existing NHRI, the functioning of which is already based on the Paris Principles. Some states parties that are currently discussing the shape of their NPM envisage integrating it into NHRIs.<sup>52</sup> Other options under discussion on an equal footing include the establishment of an entirely new body at the national level or the designation of NGOs, existing judicial offices, independent boards of visitors, ombudsman institutions, or parliamentary committees to carry out the monitoring function domestically.

## 1.6 Recent International Human Rights Treaties

Human rights actors all over the world welcomed the adoption of two new human rights treaties in 2006: The International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the UN General Assembly on 20 December 2006. It is the fruit of years of hard work by associations of relatives of victims, NGOs, and key governments. – Many NHRIs from all over the world were involved in the process that led to the adoption of the Convention on the Rights of Persons with Disabilities on December 13, 2006 by the UN General Assembly in New York. The activities NHRIs could undertake to support the speedy ratification and implementation of these conventions will be discussed in chapter 3.5.

<sup>52</sup> For an overview of the suggestions that are under discussion in various countries see: Association for the Prevention of Torture (APT) (2007): National Preventive Mechanisms – Country-by-Country Status Report. Version of 16 April 2007. Available at: <http://www.ap-t.ch/content/view/full/44/84/lang,en/>. The overview on pp. 2–8 reveals that currently a number of states are discussing including their NPM into an existing NHRI.

### 1.6.1 The Convention on the Rights of Persons with Disabilities (CRPD)

The CRPD, opened for signature, ratification and accession on 30 March 2007 but not yet entered into force, reaffirms that disabled persons are fully entitled to enjoy human rights on an equal basis with others.

The Convention aims to create an "enhanced sense of belonging" for persons with disabilities.<sup>53</sup> This is to be achieved by ending discriminatory practices against disabled people, by removing of attitudinal and environmental barriers to their participation in society, and by promoting their participation, individual autonomy and independence. While traditionally, the approach to disability was a focus on physical or mental deficits of disabled persons, the CRPD promotes the social inclusion of disabled persons and their identity as rights-bearers, thereby contributing to a more diverse and inclusive society. It aims not only to remove physical barriers to the full participation of the disabled in society through addressing infrastructural deficits,<sup>54</sup> but also to tackle socially constructed barriers that result from constantly reproduced patterns of social behaviour.<sup>55</sup>

The CRPD also envisages the establishment of a treaty body: the Committee on the Rights of Persons with Disabilities.<sup>56</sup> States will be required to submit reports on their efforts to implement the CRPD to this committee, at least every four years.<sup>57</sup> A new element in the CRPD is however, that it requires states to "maintain, strengthen, designate or establish within the state party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention."<sup>58</sup> States are also encouraged to take into account the Paris Principles when they designate or establish these mechanisms.<sup>59</sup>

Art. 33 (2) CRPD does not specify the exact shape of the independent national mechanism to promote, protect and monitor the implementation of the convention at the domestic level. Depending on the local legal and administrative context, such monitoring functions can be taken on by existing NHRIs, or new institutions may be established with the explicit mandate to promote disability issues and monitor

<sup>53</sup> Preamble, para. (m) CRPD.

<sup>54</sup> Art. 9 CRPD.

<sup>55</sup> See esp. preamble, para (e) CRPD.

<sup>56</sup> Art. 34 CRPD

<sup>57</sup> Art. 35 CRPD

<sup>58</sup> Art. 33 (2) CRPD

<sup>59</sup> Ibid.

the implementation of CRPD. An Optional Protocol to the CRPD provides for an individual complaint procedure and an inquiry procedure modelled on the procedures in treaties discussed in chapters 1.3 and 1.4.

### 1.6.2 The International Convention for the Protection of All Persons from Enforced Disappearance (ICPED)

The ICPED aims to close several gaps in the international protection and prevention of persons from enforced disappearance.<sup>60</sup> It was opened for signature, ratification and accession on 6 February 2007.

Art. 1 (1) ICPED establishes the explicit right of every human being not to be subject to enforced disappearance as a non-derogable right.<sup>61</sup> Four elements constitute an enforced disappearance as defined in art. 2 ICPED: (1) detention/deprivation of liberty of any person; (2) carried out by state agents or with the state's acquiescence; (3) the refusal to acknowledge the detention, or a concealment of the fate of the disappeared person; and (4) the placement of the disappeared person outside the protection of the law. Art. 4 ICPED requires states to ensure that enforced disappearance constitute an offence under their criminal law.

The ICPED contains comprehensive provisions on the investigation, prosecution, and penalties, including limitations, jurisdiction and extradition which reflect the complex and continuing nature of the crime of enforced disappearance.<sup>62</sup> It attaches even more importance to the prevention of enforced disappearance. Enforced disappearances are to be prevented by the absolute prohibition on secret detention that has been made explicit in IHRL by the ICPED for the first time, and the application of strict criteria to all situations in which persons are deprived of their liberty.

Due to the fact that the harm suffered as a result of an enforced disappearance is not limited to the disappeared person, the ICPED puts forward a broad view of who is a "victim" of an enforced disappearance: in addition to the disappeared person it comprises "any individual who has suffered harm as a direct result of an enforced

<sup>60</sup> For a more detailed overview on the International Convention for the Protection of All Persons from Enforced Disappearance see: McCrory, Susan (2007): *The International Convention for the Protection of all Persons from Enforced Disappearance*, in: *Human Rights Law Review*, Vol.7, Issue 3, p.545- 566.

<sup>61</sup> Art. 1 (2) ICPED.

<sup>62</sup> Arts. 8-16 ICPED.

disappearance."<sup>63</sup> This may include the family and friends of the disappeared person who suffer from distress and uncertainty; and sometimes the larger community that may be exposed to terror and fear of repetition. All victims of an enforced disappearance have the right "to know the truth regarding the circumstances of an enforced disappearance" which includes any results of any investigation into the whereabouts of the disappeared person.<sup>64</sup> In this context, states are obliged to "search for, locate and release disappeared persons," and give victims "the right to obtain reparation and prompt, fair and adequate compensation" under national legislation.<sup>65</sup> The ICPED also obliges states to take appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.<sup>66</sup> These requirements are based on experiences showing that the absence of a clear legal status of missing persons can cause additional difficulties for families concerned. The ICPED also contains a provision on the issue of enforced disappearance of children.<sup>67</sup>

Art. 26 ICPED provides for the establishment of a treaty body once the convention has entered into force: the Committee on Enforced Disappearances. It is mandated to consider states parties' reports, to conduct inquiries, and to examine individual communications.<sup>68</sup> Regarding individual communications, states have to explicitly recognise the Committee's competence.<sup>69</sup> The Committee on Enforced Disappearances has several innovative procedures: it can receive urgent requests that "a disappeared person should be sought and found", submitted by relatives of the disappeared person or their legal representatives.<sup>70</sup> If the admissibility criteria for this urgent action procedure are met, the Committee may request the state party concerned to take the necessary measures to locate and protect the disappeared person, and to inform the Committee on the measures taken within a specific period of time.<sup>71</sup>

The Committee may also bring the question of enforced disappearance urgently before the UN General Assembly if it receives well-founded information that enforced

<sup>63</sup> Art. 24 (1) ICPED.

<sup>64</sup> Art. 24 (2) ICPED.

<sup>65</sup> Art. 24 (3) and (4) ICPED.

<sup>66</sup> Art. 24 (6) ICPED.

<sup>67</sup> Art. 25 ICPED.

<sup>68</sup> Arts. 29, 31 and 33 ICPED.

<sup>69</sup> Art. 31 (1) ICPED.

<sup>70</sup> Art. 30 ICPED.

<sup>71</sup> Art. 30 (2) and (3) ICPED.



disappearance is being practised on a widespread or systematic basis in a territory under the jurisdiction of a state party to the ICPEP.<sup>72</sup>

The ICPEP also contains a provision that is of particular interest for NHRIs: art. 28 ICPEP requires the Committee on Enforced Disappearances to cooperate with all relevant organs of the UN (including already existing treaty bodies), and, most importantly for our context, with state institutions, agencies or offices working towards the protection of all persons against enforced disappearances. This includes NHRIs.

## 1.7 The Debate on Reform of the UN Human Rights TB System

Despite its positive contributions to the promotion and protection of human rights worldwide, the UN TB system in its current form faces numerous challenges which prevent it from fully realising its potential to support national human rights capacity and accountability. From the mid 1980s on, analyses of the TB system led to a general agreement that the system is in need of reform to ensure its long-term effectiveness. Since any reform of the system will have implications for the cooperation of NHRIs and the UN TBs, the main issues under discussion should be looked at here, from the perspective of NHRIs.

Some of the main problems analysts have identified as undermining the effectiveness of the TBs are:<sup>73</sup>

- The TB system is funded inadequately, including the OHCHR which acts as a secretariat for the TBs. A continuously increasing workload is not met with increasing resources.
- States parties do not sufficiently engage with the TB system, despite their formal commitments. This may be due to the lack of capacity or due to the lack of political will. Complex and sometimes overlapping state reporting obligations to several TBs contribute to states failing to report, to severe delays in reporting, or to poor quality reports.
- Implementation of TBs' findings needs to be improved. A systematic monitoring cannot be offered by international bodies. Thus, efforts to improve the human rights situations at the national level are diluted.

<sup>72</sup> Art. 34 ICPEP

<sup>73</sup> Problems of the TB system summarised here have been analysed in various reports and publications, *inter alia* in the UNHCHR's Concept Paper: OHCHR (2006): Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body. UN Doc. HRI/MC/2006/2, 22 March 2006, paras. 15–26.

- The TB system is fragmented. This is due to the variety of procedural requirements developed by the currently existing seven TBs; and the lack of coordination and collaboration among TBs themselves, and between TBs and other actors, such as OHCHR field offices, other UN agencies, NHRIs, relevant state-level public administrations, NGOs, etc. This, *inter alia*, has sometimes resulted in the formulation of inconsistent Concluding Observations by various TBs that set different priorities and give diverging guidance to states. Concluding Observations are sometimes formulated in general language instead of giving clear and practical instructions on how to implement them.
- There is a general lack of visibility and accessibility of the UN TB system. The system is little known beyond a small circle of national and international human rights experts with the consequence that the TBs' Concluding Observations are rarely discussed publicly or in the national and international media. Inconsistent working methods of various TBs are also an obstacle to the participation of NGOs and NHRIs in the TB process.

Debate on reforming the UN TB system has been stimulated by the UNHCHR's 2005 Plan of Action and her proposal (Concept Paper) to establish a unified standing treaty body.<sup>74</sup> Since the UNHCHR's proposal was issued, several meetings and consultations on reform of the UN TB system have taken place,<sup>75</sup> and the proposal has been discussed by the various existing TBs.<sup>76</sup>

Many stakeholders agree on the analysis of the weaknesses of the system, but there is little agreement on the solutions. The move towards a unified standing treaty body proposed by the UNHCHR is supported by some actors, rejected by others. Critics of this proposal support less radical reforms such as incremental improvements aiming for further harmonisation of the TB working methods that would make TBs function as a unified system. Steps towards this end would include the

<sup>74</sup> OHCHR (2005): Plan of Action submitted by the United Nations High Commissioner for Human Rights. UN Doc. A/59/2005/Add. 3, 26 May 2005; and OHCHR (2006): Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body. UN Doc. HRI/MC/2006/2, 22 March 2006.

<sup>75</sup> Two meetings were held in Malbun, Liechtenstein, and one in Nottingham, UK. Cf.: UN, (2003): Report of a Brainstorming Meeting on Reform of the Human Rights Treaty Body System. Malbun, Liechtenstein, 4–7 May 2003, UN Doc. A/58/123, 8 July 2003 ("Malbun I"); Human Rights Law Centre, University of Nottingham (2006): Report on an Expert Workshop on Reform of the United Nations Human Rights Treaty Monitoring Bodies. Nottingham, 11–12 February 2006. Available at: [www.nottingham.ac.uk/law/hrlc/](http://www.nottingham.ac.uk/law/hrlc/); UN, (2006): Chairperson's Summary of a Brainstorming Meeting on Reform of the Human Rights Treaty Body System. Malbun, Liechtenstein, 14–16 July 2006, UN Doc. A/61/351, 18 September 2006, ("Malbun II").

<sup>76</sup> For a summary of the views of the TBs on the UNHCHR's Concept paper see: 6th Inter-Committee Meeting/19th Meeting of Chairpersons of the Human Rights Treaty Bodies (2007): Report of the Working Group on the Harmonization of Working Methods of Treaty Bodies. UN Doc. HRI/MC/2007/2, 9 January 2007.

adoption of measures that aim at further harmonising and streamlining all areas of the TBs' work ranging from reporting guidelines over procedural issues up to the adoption of General Comments. This should result in a more coherent and therefore more accessible and transparent TB system. Efforts to enhance cooperation among TBs themselves as well as cooperation with key stakeholders such as other UN entities, NGOs, and NHRIs are under way albeit at a slow pace.

While measures will have to be taken on the structural level, particularly relating to better coordination between TBs, improved cooperation between NHRIs and UN TBs would address several shortcomings of the current UN TB system named above – ranging from a more systematic monitoring up to visibility – and contribute to an improved implementation of human rights treaties. The review of existing cooperation between NHRIs and TBs in chapter 3 of this publication is a step towards enhancing and building up this cooperation.

## 2

# National Human Rights Institutions

NHRIs as key institutions for the promotion and protection of human rights within their countries have been set up by many states in recent years.<sup>77</sup> The tasks and shape of these institutions vary from country to country, which is due to the diverse local culture, legal traditions and political systems in which these institutions function. NHRIs can take the form of human rights commissions, ombudsman institutions, public defender's offices, advisory human rights institutes, and a wide variety of other forms. They are established and financed by the state, but should be able to act independently. Ideally, NHRIs should have a mandate to engage in the promotion and protection of all human rights: civil and political rights, as well as economic, social and cultural rights.

The Principles Relating to the Status of National Institutions, called the Paris Principles, were adopted by the General Assembly in December 1993.<sup>78</sup> They result from an international workshop of NHRIs that took place in Paris in 1991. They formulate standards for NHRIs, and aim to guarantee their independence. Being framed in a broad and general way, the Paris Principles can be applied to all types of NHRIs. They set out competence and responsibilities of NHRIs, and reiterate the important role that NHRIs can play in the implementation of IHRL at the national level.<sup>79</sup> The Paris Principles suggest that NHRIs should, *inter alia*, work for the harmonisation of national laws with international human rights norms, encourage ratification of international human rights treaties, assist in human rights education, conduct

<sup>77</sup> The website of the National Human Rights Institutions Forum currently lists 119 NHRIs, 63 of them accredited with status A without reservation. Accreditation with status A means that the NHRI complies with the Paris Principles. Cf.: <http://www.nhri.net/nationaldatalist.asp> (18 September 2007).

<sup>78</sup> The Principles Relating to the Status of National Institutions (the Paris Principles) were adopted by General Assembly resolution 48/134 of 20 December 1993. These standards provide guidance for the establishment, competence, responsibilities, composition and guarantees for independence, pluralism, methods of operation, and quasi-judicial activities of NHRIs.

<sup>79</sup> See Section A of the Paris Principles.

research into human rights issues, submit reports or recommendations to any public administrative body on matters concerning the promotion and protection of human rights, and cooperate with other actors involved in human rights work at the national, regional and international level.<sup>80</sup>

NHRIs can also have the function to receive and investigate complaints and petitions from individuals who allege that their human rights have been violated.<sup>81</sup> Usually, however, NHRIs do not have the power to make binding decisions in response to complaints about human rights violations. But they do normally have the opportunity to refer the matter to the judiciary, if necessary.

Several provisions of the Paris Principles aim at securing the independence of NHRIs, which is of utmost importance for NHRIs to gain public legitimacy and to carry out their functions effectively. Independence is not an option to choose but a constitutive element: A NHRI has to be independent, and this is to be secured by sufficient core funding from the government. The Paris Principles suggest a few mechanisms to ensure independence: the exclusion of voting rights for government representatives in governing bodies of the institution, "the pluralist representation of the social forces involved in the promotion and protection of human rights",<sup>82</sup> the provision of adequate funding,<sup>83</sup> and the legal basis for NHRIs.<sup>84</sup> NHRIs cooperate with human rights NGOs and other civil society actors; their role is different though. Normally working on a broader range of topics than NGOs, NHRIs rely on the practical expertise of NGOs. NHRIs often build bridges and serve as a platform for discussion between government actors and civil society.

All accredited NHRIs from all over the world that operate in conformity with the Paris Principles elect an International Coordination Committee (ICC). The Committee has sixteen members – four representatives from each of the four regional groups Africa, Europe, the Americas and Asia-Pacific.<sup>85</sup> While the OHCHR's National Human Rights Institutions Unit and the OHCHR's Technical Cooperation Programme support NHRIs in many different ways, the ICC coordinates meetings, international conferences and common projects of NHRIs. It encourages joint activities by NHRIs, liaises

<sup>80</sup> Ibid.

<sup>81</sup> This possible function of NHRIs is outlined in Section D of the Paris Principles which also lists particular obligations for NHRIs that have the mandate to receive and investigate individual complaints.

<sup>82</sup> Paris Principles, Section B, para. 1.

<sup>83</sup> Paris Principles, Section B, para. 2.

<sup>84</sup> Paris Principles, Section A, para. 2.

<sup>85</sup> See <http://www.nhri.net/>.

with the UN and other international and regional organisations, assists states to establish NHRIs and supports NHRIs by training and advice. One of the most important tasks of the ICC is prepared by its Subcommittee on Accreditation: NHRIs have to be accredited by the ICC, and that means that their mandate and activities have to conform to the Paris Principles. The Subcommittee reviews a considerable number of NHRIs per annum that either search accreditation (the so-called status A) or re-accreditation – the latter process being conducted at a regular interval of about 5 years. Re-accreditation has been introduced to make sure that the conformity of all institutions with the Paris Principles is reviewed on a regular basis – conditions in a country or within an NHRI may change.

The Paris Principles state that "NHRIs should encourage ratification of international instruments and encourage their implementation, ... contribute to state reports which are required to be submitted by states parties to United Nations bodies or committees ... pursuant to their treaty obligations and where necessary to express an opinion on the subject, with due respect to their independence."<sup>86</sup>

The Paris Principles generally encourage cooperation between NHRIs and the UN and its agencies. This suggests that NHRIs can, along with local NGOs, become key partners to UN TBs and thereby more closely connect the UN TB system to national administrations and other human rights actors at the national level. The third chapter of this handbook will outline the elements of fruitful cooperation between NHRIs and UN TBs that help to achieve maximum synergies from both parties' efforts to promote and protect human rights.

<sup>86</sup> Paris Principles, Section A, para. 3 (c) and (d).

## 3 NHRIs' Role in the UN Treaty Body Process

The following chapter reviews how NHRIs cooperate with the various bodies and mechanisms of the UN Human Rights TB system, the functions of which were explained in chapter 1. Since this cooperation is still in its early stages, the ways such interaction can possibly be expanded and strengthened are discussed as well. However, the review and discussion of means of interaction cannot of course be exhaustive. Also, it has to be kept in mind that the feasibility and adequacy of applying a specific means must always be evaluated strategically by the NHRIs in the local context.

### 3.1 NHRIs' Involvement in the State Reporting Process

#### 3.1.1 NHRIs' Involvement in the Process Prior to the Official Sessions of Treaty Bodies

There are several possibilities for NHRIs to become involved in the TB process before the official session of a TB takes place in Geneva or New York. Activities range from reminding governments of their reporting obligation, urging governments to sign, ratify or accede to human rights treaties, to submitting their own reports to TBs.<sup>87</sup>

#### Encouraging States to Comply with their Reporting Obligations

As mentioned above, a number of states are behind with their reporting to TBs; and some states do not report at all. NHRIs are well placed to use their influence to urge governments to take their reporting obligation seriously. A continuous dialogue between staff members of NHRIs and government officials may help to build and

strengthen the governments' political will to actively engage in the implementation of human rights.<sup>88</sup> An NHRI can also send information on the human rights situation in its country if the respective committees intend to review the implementation of the provisions of the relevant conventions in the absence of the state party's reports.

#### Uganda Human Rights Commission successfully urges the Ugandan government to produce its overdue reports to Treaty Bodies

The Uganda Human Rights Commission was established in 1995 by Uganda's new constitution. Uganda had ratified the ICERD, ICESCR, CAT, CEDAW and CRC by 1990 and the ICCPR in 1995. As of January 2000, Uganda had a backlog of eighteen overdue reports it had not submitted to the respective treaty bodies from 1985 onwards.

Therefore, since it started working in 1997, the Uganda Human Rights Commission in cooperation with other stakeholders urged the government to produce its reports. As a result, Uganda's reporting record has improved in recent years. Since 2003, Uganda submitted reports to the HRCtee, the CERD, CEDAW, CRC, and CAT. In addition, the Uganda Human Rights Commission, together with UNDP and OHCHR engaged in capacity development activities to enable state representatives to write the adequate reports.

Source: Uganda Human Rights Commission (2006): National Institutions and the Reporting Process Before the Treaty Body Session. Presentation by Mrs. Margaret Sekaggya, Chairperson, Uganda Human Rights Commission, at the Roundtable on the Role of National Human Rights Institutions in the Treaty Body Process, Berlin 23–24 November 2006 (on file with authors); and: Reporting History – Uganda, available at: <http://www.bayefsky.com/docs.php/area/rephistory/state/179>

If civil servants lack the technical capacity to prepare the reports, NHRIs may facilitate training, offered by either international experts or NGOs or by themselves.<sup>89</sup> NHRIs can also engage in general educational activities and awareness-raising campaigns that aim to inform and sensitise government officials, parliamentarians,

<sup>87</sup> In this handbook, the authors relate to "NHRI reports" and "NGO reports", for reasons of simplicity.

<sup>88</sup> This is, for example, a goal of the Malawi Human Rights Commission, see: Malawi Human Rights Commission (2004): Annual Report of the Malawi Human Rights Commission for the Year 2004. Available at: [http://www.malawihumanrightscommission.org/docs/2004\\_MHRC\\_AnnualReport\\_.pdf](http://www.malawihumanrightscommission.org/docs/2004_MHRC_AnnualReport_.pdf).

<sup>89</sup> OHCHR also regularly organises training activities for government officials responsible for the reports to TBs within the context of its Technical Cooperation Programme.

journalists and the general public for their countries' international human rights obligations. Such activity is also encouraged by the General Comments of the CERD, the CESCR, and the CRC.<sup>90</sup> In the framework of such educational activities, NHRIs may recall the primary reasons that have driven the ratification of international human rights treaties: In addition to the promotion and protection of human rights in their own territory, states wish to consolidate their democratic systems, want to become integrated in the international community, and to set a positive example for human rights protection on the global level. NHRIs may also conduct training events and workshops on international human rights and make sure that IHRL becomes an integrated part in the curricula of law schools. Generally, a greater awareness of the functions and purposes of the international human rights system within a country seems to be conducive to governments adequately meeting their reporting obligations.

### Urging Ratification and Removal of Reservations

NHRIs can also encourage their governments to sign, ratify or accede to human rights treaties. Various activities that NHRIs can undertake to encourage ratification are discussed below in chapter 3.4 with regard to OP-CAT.

The value of a ratification is seriously diminished by reservations to human rights treaties.<sup>91</sup> Many of these reservations contradict the object and purpose of human rights treaties, undermine their integrity, and hamper their effective implementation. NHRIs can therefore urge their governments to review and withdraw their reservations, or at least bring them into conformity with the object and purpose of a particular treaty.<sup>92</sup>

<sup>90</sup> CESCR (1998): General Comment No. 10 – The Role of National Human Rights Institutions in the Implementation of the International Covenant on Economic, Social and Cultural Rights. UN Doc. E/C.12/1998/25, 10 December 1998, para. 3; CRC (2002): General Comment No. 2 – The Role of National Human Rights Institutions in the Protection and Promotion of the Rights of the Child, UN Doc. CRC/GC/2002/2, 15 November 2002, para. 19 (m); and CERD (1993): General Comment No. 17 – Establishment of National Institutions to Facilitate Implementation of the Convention, 25 March 1993. In: Annual Report of the Committee on the Elimination of Racial Discrimination. Official Records of the General Assembly, 48th Session, Supplement No. 18, UN Doc A/48/18, 1993, p.117, para. 1 (d).

<sup>91</sup> The reasons for this is that the regime governing reservations in general international law set out in Part II, Section 2 of the Vienna Convention on the Law of Treaties is ineffective with regard to Human Rights Treaties. An alternative regime set out in: HRCtee (1994): General Comment No. 24 – Reservations to the Covenant or Optional Protocols or Declarations under art. 41 of the Covenant. UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, has been met with great reserve from states parties.

<sup>92</sup> For example, the Australian Human Rights and Equal Opportunities Commission (HREOC) encouraged the Australian government to remove reservations made by Australia to ICERD.

### Roundtable Discussions on the CRC organised by the Human Rights Commission of Malaysia (SUHAKAM) urge the Malaysian government to withdraw its eight reservations to the CRC

On 19–20 January 2004 SUHAKAM initiated a roundtable discussion on the CRC, attended by government ministries, agencies, NGOs, and some individual experts. The meeting discussed ways to further the implementation of CRC in Malaysia, and to recommend the government to withdraw its reservations.

The meeting examined each of the eight Malaysian reservations and urged the Malaysian government to withdraw them or review them thoroughly with a view to withdrawal. This request was taken up by SUHAKAM and put forward as a recommendation to the Malaysian government.

Source: Human Rights Commission of Malaysia (2004): Convention on the Rights of the Child – Report of the Roundtable Discussion. 19–20 January 2004, available at: [http://www.suhakam.org.my/en/document\\_resource/details.asp?id=86](http://www.suhakam.org.my/en/document_resource/details.asp?id=86)

### NHRI Reports and Additional Information to Treaty Bodies

Often, NHRIs have a good overview on the conformity of their government's policies and national legislation with international human rights principles.<sup>93</sup> In their working methods TBs therefore encourage NHRIs to submit their own reports or independent information to the TBs in order to expand the information base on which TBs consider states' reports. Treaty bodies that develop indicators for the reporting process could draw on knowledge and expertise in NHRIs on the appropriateness and quality of an indicator for a given country.

### NHRIs submitting their own reports or additional information to UN Treaty Bodies

The South African Human Rights Commission sent a detailed supplementary report to CERD in August 2006, available at: [http://www.sahrc.org.za/sahrc\\_cms/downloads/CERD\\_Shadow%20Report.pdf](http://www.sahrc.org.za/sahrc_cms/downloads/CERD_Shadow%20Report.pdf)

<sup>93</sup> The vast majority of NHRIs is mandated to assess whether legislation and policy in their country comply with international human rights principles.

In February 2006, the Netherlands' Equal Treatment Commission sent a commentary on the fourth Dutch report on the implementation of CEDAW. The commentary also contained suggestions to CEDAW on what the Committee might ask and primarily discuss with the Dutch delegation. The commentary is available at: [http://www.cgb.nl/\\_media/downloadables/advisory%20opinion%202006%2003.pdf](http://www.cgb.nl/_media/downloadables/advisory%20opinion%202006%2003.pdf)

The Australian Human Rights and Equal Opportunities Commission in 2006 provided a written submission in relation to the Australian government's combined thirteenth and fourteenth periodic report under ICERD. The submission mainly dealt with issues of relevance to the human rights of indigenous people. It is available at: [www.humanrights.gov.au/cerd/index.html](http://www.humanrights.gov.au/cerd/index.html)

Many NHRIs submit such reports or other specific information to TBs.<sup>94</sup> TBs often refer to this information in their Concluding Observations. Sometimes, this allows TBs to strengthen the position of NHRIs and to confer recognition on NHRIs' efforts to promote and implement human rights at the national level.

When submitting reports or other information to TBs, NHRIs should consider coordinating their submission with submissions of NGOs and other relevant actors of civil society. TB members have very little time to consider lengthy and detailed reports from NGOs and NHRIs. It is, therefore, essential that NGOs and NHRIs concentrate on giving information on matters of urgency and on issues on which they possess the greatest expertise.<sup>95</sup> However, when NHRIs coordinate with NGOs and other actors, they should bear in mind their status as institutions independent of both NGOs and governments.

### Assisting Governments to Prepare Reports to Treaty Bodies

Numerous NHRIs assist government departments that are responsible for writing their state's reports in preparing these reports. This is recommended by General

<sup>94</sup> Information given by NHRIs may, for example, include outcomes of national inquiries into the impact of particular laws and policies on the enjoyment of human rights.

<sup>95</sup> For example, the Irish Human Rights Commission decided not to participate in the session before the CRC, but left this to NGOs specialising in children's rights and to the Irish Ombudsman for Children, since these actors possessed greater expertise regarding children's rights. Cf.: Irish Human Rights Commission (2006): National Institutions and the Reporting Process during the Treaty Body Session. Speech by Dr. Alpha Connelly, Chief Executive, Irish Human Rights Commission, at the Roundtable on the Role of National Human Rights Institutions in the Treaty Body Process, Berlin 23–24 November 2006 (on file with the authors).

Comment No 2 of CRC and General Comment No 17 of CERD, which both encourage states parties to consult NHRIs during the preparation of reports. CERD regularly acknowledges NHRIs' assistance in the elaboration of states parties' reports. NHRIs may be able to offer relevant information, data and statistics on human rights issues to government institutions that are charged with the preparation of reports. They can review, advise, and comment on draft reports, and make sure that the report contains an adequate description of the NHRI's activities.<sup>96</sup>

### The Indian National Human Rights Commission urges the government to pay due attention to disability issues when reporting to HRCtee, CEDAW and CRC

In its annual report 2004/05, the Indian Human Rights Commission reports that it reviewed the periodic reports submitted by the Indian government to HRCtee, CEDAW and CRC. It found that the "reports display a lack of sensitivity in reporting on the rights of persons with disabilities", and recommended to take disability into consideration in future reports.

Source: Indian National Human Rights Commission (2005): Annual Report 2004/05 of the Indian National Human Rights Commission. Esp. chapter 5, p. 90. Available at: <http://www.nhrc.nic.in/Documents/AR/AR04-05ENG.pdf>

NHRIs may also draw the attention of government officials to use the recently adopted harmonised reporting guidelines, and to take the relevant TBs' General Comments into account when they write their reports. By promoting the new harmonised reporting guidelines NHRIs would also support the TBs' efforts to streamline their working methods. Where NHRIs do not possess required expertise to assist governments in the preparation of reports, NHRIs may invite experts from relevant UN agencies, basically the OHCHR, to engage in capacity development activities in this regard.

However, NHRIs should not participate extensively in the actual formulation of a country's reports or even write whole reports, since this would be inconsistent with

<sup>96</sup> The Nepalese National Human Rights Commission, for example, regularly comments on its government's periodic reports. Cf.: National Human Rights Commission of Nepal (2004): Annual Report 2004 – National Human Rights Commission of Nepal, p. 15.



their independent status. There have been examples in which NHRIs became too involved in the drafting of reports, and their ability to review their governments' human rights record was reduced accordingly. Many governments have human rights focal points in relevant ministries which are better suited to write the state's reports.

### Encouraging NGO Reporting

NHRIs can also encourage NGOs to send their own reports to TBs. They may inform NGOs about the TB process by holding workshops on the procedures before various committees, and explain how NGOs may best prepare reports. TB members could be invited to these workshops and advise NGOs on how to engage in reporting most effectively. Given the time constraints set by TBs, NHRIs should encourage coordinated or common alternative NGO reporting. In some countries, NHRIs might think of inviting experts from UN bodies or specialised agencies, such as OHCHR field offices, UNICEF, UNDP or UNIFEM to such meetings, especially if NHRIs themselves do not possess sufficient expertise in required fields.

However, just as NHRIs must ensure that their involvement in assisting states to write their reports does not compromise their independent status, they should also make sure that they maintain their own institutional profile in their relation to NGOs.

### Interacting with Treaty Bodies' Country Rapporteurs and Pre-sessional Working Groups

NHRIs could also contribute to the development of the "list of issues" through cooperation with country rapporteurs of relevant TBs who are mainly responsible for the compilation of these lists.<sup>97</sup> Providing information in due time for the rapporteurs through the secretariat is critical. NHRIs may also consider participating in the meetings of pre-sessional working groups or country task forces (in the case of HRCttee) which discuss and adopt the list of issues. When submitting relevant and reliable reports or other information to UN TBs, NHRIs are already likely to influence the content of the list of issues that are drafted by the country rapporteurs. Country rapporteurs usually base their drafts on all information before them, inclu-

<sup>97</sup> For a chart on TB working methods see Nineteenth meeting of chairpersons of the human rights treaty bodies; Sixth Inter-Committee Meeting of the human rights treaty bodies, (2007), Report on the implementation of recommendations of the 6th Inter-Committee Meeting and the 18th Meeting of Chairpersons, Un-Doc. HRI/MC/2007/6; 29 May 2007, Annex 1.

ding on NHRIs' submissions. However, NHRIs may consider directly addressing the country rapporteur with additional information on specific human rights issues if they deem it necessary.

Those TBs that meet in pre-sessional working groups often involve NGOs, NHRIs, other UN bodies and specialised UN agencies in these meetings. This gives NHRIs an additional opportunity to make oral presentations or submit written information on relevant issues to the committees, since the discussion and adoption of lists of issues are often on the agenda of pre-sessional working groups. For example, the working methods of CESC and CRC's General Comment No. 2 call for NHRIs to participate in the pre-sessional working groups of CESC and CRC.

### 3.1.2 NHRIs' Role During the Presentation of States Parties' Reports

Depending on the particular working methods of different TBs, NHRIs can get involved, by some means or other, in the actual session during which a TB examines states' reports. They can, for example, join the informal meetings with TB members or may be given the opportunity to make an oral presentation during the official session.

### Informal Meetings with Treaty Body Members

In the practice of CESC, CEDAW and CRC, NHRIs either join the informal meetings of members of these committees with NGOs, or a separate informal meeting between TB members and NHRIs is organised in the run-up to the official session of the relevant treaty body. CESC, for example, gives NHRIs the choice to either report to the Committee in an open meeting together with NGOs or, if they prefer, they may report to the Committee in a separate closed meeting. CRC prefers NHRIs to request a private meeting with Committee members including during their pre-sessional working group. CEDAW invites NHRIs to present their information to the Committee in a special time slot on the same day as the meeting between the Committee and representatives of NGOs.

#### The Irish Human Rights Commission (IHRC) before CEDAW

On the occasion of the consideration of the fourth and fifth combined periodic report on the implementation of CEDAW in the Republic of Ireland, the IHRC requested CEDAW to be allowed to give an oral presentation during the official

session. CEDAW in turn decided to allocate a separate segment during the informal meeting with NGOs to receive information from the independent IHRC. The Commission spoke after and separately from NGOs.

CEDAW expressed its satisfaction with the involvement of the IHRC in the examination procedure, and agreed to further discuss and develop the modalities of such interaction.

Source: CEDAW (2005): Annual Report of the Committee on the Elimination of Discrimination against Women. Official Records of the General Assembly, 60th Session, Supplement No. 38, UN Doc. A/60/38, 2005, para. 426.

Generally, NHRIs prefer to interact with TB members separately from NGOs or, at least, in a separate time slot, before or after NGOs. On the one hand, their status is different from NGOs, and they also do not want to take up time allocated to NGOs.<sup>98</sup> Some TB members also meet with staff from NHRIs outside formal working hours, for example during lunch breaks. At such informal briefings, representatives of NHRIs may be able to clarify and supplement information that is before the committee. This is established practice of HRCttee. CERD also reports that, over recent years, NHRIs have on several occasions taken part in such informal briefings.

### Participation in Official Sessions of Treaty Bodies

CERD and CMW have taken the approach of involving NHRIs in their official sessions: they decided to give NHRIs the opportunity to make a statement during the official examination of their state's reports, if the state party's delegation has no objections. This opportunity is not even given to NGOs that have the right to attend the public official sessions of the TBs, but are not allowed to make any oral presentation during these sessions.

In its Annual Report 2006, CMW announced its decision to give NHRIs from states whose reports are to be examined the opportunity to make a statement during the

<sup>98</sup> In her speech at the Berlin conference, a representative of the IHRC reported that the Commission attended the meeting of CERD with NGOs, but did not make any statements because it did not want to take time from NGOs. IHRC (2006): National Institutions and the Reporting Process during the Treaty Body Session. Speech by Dr. Alpha Connelly, Chief Executive, Irish Human Rights Commission, at the Roundtable on the Role of National Human Rights Institutions in the Treaty Body Process, Berlin 23–24 November 2006 (on file with authors).

official session. CERD already follows such practice, for example with regard to the Irish Human Rights Commission, the Zambian Human Rights Commission, the Danish Institute for Human Rights, and the South African Human Rights Commission.

### The Zambian Human Rights Commission participates in the session of CERD

During its 67th session held in August 2005, CERD invited the Zambian Human Rights Commission to make an oral presentation on the second day of the official consideration of the Zambian state report. The participation of the Zambian Human Rights Commission in the session had a great influence on the content of the Concluding Observations: CERD positively acknowledged the fact that the governmental delegation agreed to the participation of the Zambian Human Rights Commission in the dialogue with the Committee. In other paragraphs, the Concluding Observations refer extensively to the work of the Zambian Human Rights Commission, and give numerous recommendations to the state party on how to strengthen the Human Rights Commission and how the state's agencies might better cooperate with the Commission in the implementation of ICERD in Zambia.

Source: CERD (2007): Concluding Observations – Zambia. UN Doc. CERD/C/ZMB/CO/16, 27 March 2007

CERD recently formalised this practice by adopting an amendment to its official rules of procedure. A new paragraph was added under rule 40, stating that "NHRIs accredited to take part in the deliberations of the Human Rights Council may, with the consent of the concerned State party, address the Committee in official meetings, in an independent capacity and from a separate seating, on issues related to the dialogue between the Committee and a State party."<sup>99</sup>

### Exceptionally: NHRIs as Part of Governmental Delegations

Sometimes, staff from NHRIs have been members of governmental delegations to TBs, or have served as advisors to their government's delegation during the session. It is at the states' discretion to request their NHRIs to participate as part of the

<sup>99</sup> An advance unedited version of the amendment to CERD's rules of procedure has been made available to the authors by the OHCHR's National Institutions Unit.



governmental delegation to the TBs; however, some TBs discourage such participation as it may compromise the NHRIs' independent role.<sup>100</sup> For example, in its General Comment No. 2 CRC clearly states that it is not appropriate for governments "to include them (NHRIs) in the government delegation when reports are examined by the Committee". Also, at the fourth Inter-Committee Meeting of Human Rights Treaty Bodies in 2005, TB members participating in this meeting agreed that NHRIs need to maintain their independence, and that they should, "as far as possible, not be part of the government delegations to the treaty body sessions".<sup>101</sup> As a member of a government delegation an NHRI may feel inhibited to openly criticise, or may feel forced to defend a government decision which is out of their remit anyway. Therefore, most NHRIs consider such participation carefully, and their independent status should allow them to reject such request from their governments if need be. However, NHRIs may wish to advise their governments on the composition of competent and inclusive state delegations to the Committees when the reports are examined.

### 3.1.3 NHRIs' Role in Encouraging Implementation of Concluding Observations

Implementation of IHRL is by far the biggest challenge the UN human rights system faces today, and it is often said that gaps in implementation endanger the whole system's credibility. Therefore, the role that NHRIs play in the implementation of TBs' Concluding Observations may be among the most important activities of an NHRI related to the treaty body procedures. There is a largely unutilised potential that can still be freed up for advancing the implementation of IHRL at the national level. Concluding Observations set out how the general and often abstract human rights norms are to be implemented in the context of a particular country. The following paragraphs explore activities that NHRIs can undertake to contribute to the implementation of Concluding Observations.

#### Dissemination of Concluding Observations

TBs' Concluding Observations hardly ever reach beyond the relatively narrow circles of human rights experts and politicians who are directly involved in the reporting procedures. Concluding Observations are rarely discussed by the media and the gen-

eral public; and they are frequently not even disseminated accurately among governmental officials to whom they are addressed.

Thus, NHRIs can play a very important role in disseminating and informing about the Concluding Observations. Many NHRIs disseminate Concluding Observations as widely as possible among all relevant actors such as government officials and institutions, parliamentarians, lawyers, NGOs, academic institutions, etc. In particular, NHRIs should encourage governments to translate Concluding Observations into local languages. NHRIs can publish these translations on paper and on their websites, and can also explain the purpose of international human rights system. In addition, NHRIs can attract print, radio and TV media attention to Concluding Observations. Identifying journalists who are open to the cause of human rights as key partners might be a good strategy for NHRIs. Increased media attention on Concluding Observations will also raise public awareness on human rights and the purpose and functioning of the UN TB system as a whole.

#### Monitoring the Implementation of Concluding Observations

NHRIs' mandate to monitor the implementation of IHRL in their countries includes monitoring the implementation of Concluding Observations. Implementation may require legislative reforms, changes in policies or the adoption of new policies. Occasionally, it may be worthwhile to design an entire project to promote implementation of a Concluding Observation that combines activities such as publications, conferences and political lobbying. In countries that have adopted a national human rights plan, NHRIs can make sure that Concluding Observations are taken into consideration in the design of these plans. NHRIs should also regularly inform the national parliament about their governments' efforts (or failure) to implement Concluding Observations. If necessary, parliamentarians can then hold the government accountable for non-implementation.

**The Canadian Human Rights Commission (CHRC) presses the Canadian government to implement the HRCtee's Concluding Observations calling on Canada to act immediately to repeal section 67 of the Canadian Human Rights Act**

When the HRCtee issued its Concluding Observations on Canada's fifth periodic report on the implementation of ICCPR in Canada in November 2005, it called for the immediate repeal of section 67 of the Canadian Human Rights Act. The dis-

<sup>100</sup> OHCHR, National Institutions Unit (2006): Discussion Paper regarding the Engagement of National Human Rights Institutions in the Treaty Body Process. October 2006, para. 4, p. 2. Available at: <http://www.nhri.net/pdf/General%20Guidelines%20NIs%20and%20TBs.pdf>.

<sup>101</sup> 4th Inter-Committee Meeting/ 17th Meeting of Chairpersons of the Human Rights Treaty Bodies (2005): Report of the fourth Inter-Committee Meeting of Human Rights Treaty Bodies. Annex to UN Doc. A/60/278, 19 August 2005, para. 31.

criminary section excluded some First Nations people from protection under the Canadian Human Rights Act. By drawing on the HRCttee's Concluding Observations and the recommendations from its own special report on that issue, the CHRC successfully urged the Canadian government to repeal the respective section of the Human Rights Act, and monitored this process carefully. The CHRC also monitors the implementation of the changes in the Canadian Human Rights Act.

Source: HRCttee (2006): Concluding Observations – Canada. UN Doc. CCPR/C/CAN/CO/5, 22 April 2006, para. 22; and CHRC (2005): Press Release – November 4, 2005. Available at: [http://www.chrc-ccdp.ca/media\\_room/news\\_releases-en.asp?id=329&content\\_type=2](http://www.chrc-ccdp.ca/media_room/news_releases-en.asp?id=329&content_type=2)

### Follow-up Meetings with Relevant Actors

NHRIs can also engage in discussions with state organs, NGOs and other relevant actors of civil society on how to best implement Concluding Observations and provide advice on possible course of action in this regard. Often, Concluding Observations are formulated in rather general terms and there may be various ways to implement them. Also, responsibilities for implementation of specific Observations may not be clear-cut. Such follow-up meetings can, for example, take the form of conferences with the participation of representatives of relevant ministries, parliamentarians, and other state institutions as well as NGOs and other relevant actors of civil society.

#### The German Institute for Human Rights (GIHR) held follow-up meetings on the implementation of the Concluding Observations of CEDAW, CRC, CAT and the HRCttee in 2004

By chance, reports by the German government were examined by four different treaty bodies in 2004: by the CEDAW, the CRC, the CAT and the HRCttee. The GIHR organised follow-up meetings in 2004 on the implementation of the Concluding Observations of each of these committees. By hosting these conferences, the GIHR wanted to contribute to a continuous dialogue between the German government, civil society and international human rights bodies.

When choosing the issues to be discussed at these conferences, the GIHR selected Concluding Observations that were of high political relevance, touched on topics of public interest, or referred to more serious human rights issues in Germany.

Discussions took place between representatives from relevant ministries, civil society, academia, members of parliament and GIHR staff. TB members also participated in the discussions. The meeting adopted conclusions and recommendations that were sent to the ministries responsible for implementation of the Concluding Observations and to all other relevant actors, including the relevant UN TBs. GIHR also engaged in follow up activities regarding the implementation of the conclusions and recommendations, by contacting relevant ministries in writing or through personal meetings.

Source: Seidensticker, Frauke Lisa (2005): Examination of State Reporting by Human Rights Treaty Bodies: An Example of Follow-Up at the National Level by National Human Rights Institutions. Berlin: Deutsches Institut für Menschenrechte.

### Encouraging Capacity Development Activities by International Actors

In certain circumstances, states may be unable to implement the Concluding Observations of the UN TBs for reasons of capacity rather than political will. In such situations, NHRIs can call for international agencies like the OHCHR, but also UNDP, UNICEF, UNFPA, UNIFEM or regional organisations to support governments in the implementation of Concluding Observations.<sup>102</sup> In certain situations, international NGOs may also be in a position to provide such services. Activities of these agencies may include the organisation of conferences, trainings, and most importantly the implementation of technical cooperation projects.

### Engagement with Follow-up Procedures of TBs

As well as reporting on the outcomes of national follow-up meetings to relevant TBs, NHRIs can also engage with the specific follow-up procedures that have been established recently by some TBs. Most Committees ask states to submit specific information on the implementation of a limited number of priority recommendations within a given timeframe, or ask states parties to include information on their efforts to give effect to Concluding Observations in their next periodic report. NHRIs can encourage states to submit such specific information to the relevant treaty bodies on time. They may also wish to independently supplement or object to infor-

<sup>102</sup> Sub-regional seminars on the implementation of the CRC's Concluding Observations are, for example, held regularly by members of the CRC, often with the support of OHCHR and UNICEF. Usually, government officials, members of parliament, representatives from NHRIs and NGOs participate in these seminars.

mation given by states, or they may actively engage with the follow-up rapporteurs that have been appointed by several committees recently. NHRIs may directly get in touch with follow-up rapporteurs and discuss appropriate action to trigger or further the implementation of Concluding Observations by their states.

### Concluding Observations Guiding NHRIs' Work

NHRIs may also use TBs' Concluding Observations to determine the priorities of their own work. Concluding Observations often shed light on the most fundamental human rights issues in a specific country. They may therefore guide NHRIs in their decision-making on how to best use their resources to improve the human rights situation within their countries. In other cases, NHRIs can use Concluding Observations to confirm and strengthen activities already undertaken by them. Sometimes, Concluding Observations mention NHRIs, or are even addressed to them directly. NHRIs may also encourage NGOs to organise their activities around the implementation of specific Concluding Observations, and to support their implementation in general.

#### The CAT's Concluding Observations helps the Albanian People's Advocate (Ombudsman) to extend its mandate

In the 2005 Concluding Observations issued by CAT after examination of Albania's initial report to the Committee, Albania was asked to allow "regular and unannounced visits to police stations by the Office of the Ombudsman" to prevent torture and other cruel, inhuman or degrading treatment or punishment. This recommendation encouraged the Albanian People's Advocate to pressure the government for a change in the Law on the People's Advocate of the Republic of Albania, and give the People's Advocate the right to enter all institutions of public administration, including prisons, police stations, hospitals, orphanages, etc.

In response to CAT's recommendation and the People's Advocate's pressure, the Albanian government introduced changes to the Law on the People's Advocate, broadening the People's Advocate's mandate as required by CAT.

Sources: CAT (2005): Concluding Observations – Albania. UN Doc. CAT/C/CR/34/ALB, 21 June 2005, para. 8(I); CAT (2006): Comments by the Government of Albania on the Conclusions and Recommendations of the Committee Against Torture. UN Doc CAT/C/ALB/CO/1/Add.1, 17 August 2006, para. 14;

People's Advocate of the Republic of Albania (2006): Annual Report on the Activity of the People's Advocate 2006, p. 37 and p. 97–185. Available at: <http://www.avokatipopullit.gov.al/English/Reports/Report%202006.pdf>; and Law on The People's Advocate of the Republic of Albania (Law No.8454, dated 4 February 1999, amended with Law No 8600, dated 10 April 2000 and Law No 9398, dated 12 May 2005). Available at: <http://www.avokatipopullit.gov.al/English/Legal%20Basis.htm>

## 3.2 NHRIs' Role in the Individual Complaints Procedures

Compared to their involvement in the states' reporting process before the UN TBs, today NHRIs' participation in the individual complaints procedures of the HRCttee, CEDAW, CAT, and CERD is marginal. The following paragraphs therefore develop some ideas about how NHRIs can increase their activities related to the individual complaints procedures, in addition to reviewing the available information on NHRIs' involvement into the procedures.

### 3.2.1 Promoting the Individual Complaints Procedures

There are several ways in which NHRIs can become involved in the individual complaints procedures before CAT, CERD, CEDAW, and the HRCttee. While all NHRIs will somehow be engaged in contributions to an effective legal system at the national level that includes effective domestic legal remedies for human rights violations, they can also urge their governments to ratify the Optional Protocols to ICCPR and CEDAW, and to make the relevant declarations under art. 22 CAT and art. 14 (1) ICERD.

#### Effective Remedies at National Level

First and foremost, effective remedies for victims of human rights violations must be available at the national level. Remedies at the international level, like the individual complaints procedures under various UN TBs, can only handle a limited number of cases, and are meant to supplement national and regional mechanisms in cases where these mechanisms do not function properly. Many NHRIs promote a well-functioning judicial system that is accessible and affordable for everyone, and that generally functions in accordance with relevant provisions of IHRL.<sup>103</sup> Also, NHRIs monitor the implementation of the stipulations of human rights treaties in their

<sup>103</sup> Esp. with art. 2 (3) (a) and art. 14 ICCPR.

national law. They assess whether their state's legislation and policies comply with international human rights principles.

A number of NHRIs have a mandate to conduct investigations into complaints from individuals who claim that their human rights have been violated by national authorities, and, if necessary, to recommend measures national authorities should take to redress and end such violations.<sup>104</sup>

Effective remedies at the national level can also help reduce the number of individual complaints to UN TBs to the most serious ones that are inadequately handled by domestic mechanisms. This seems to be of growing importance, because the caseload of TBs is increasing steadily while their meeting times remain limited. In addition, well-functioning domestic redress mechanisms make sure that individuals have the opportunity to exhaust domestic remedies which is a precondition for filing complaints to TBs.<sup>105</sup> However, investigations by a NHRI do not represent a necessary domestic remedy that has to be exhausted before an individual can approach regional or international mechanisms, since findings of NHRIs are, in contrast to judgements issued by courts, not automatically enforced at the national level.<sup>106</sup>

### Encouraging the Acceptance of Individual Complaints Procedures

Nevertheless, even for a NHRI with a mandate to handle individual complaints there may be situations where the use of an international complaints procedure of UN TBs is appropriate. As mentioned above, the individual complaints procedures under ICERD, CAT and the Optional Protocols to the ICCPR and CEDAW are generally underutilised. As the international procedures may in some cases be the last resort for persons suffering from violations of their human rights to seek redress, NHRIs should urge their governments to accept the individual complaints procedures, especially by explaining the purpose and benefit of the procedures to government offi-

<sup>104</sup> For a useful guide for NHRIs on how to handle individual complaints see: UNDP Regional Centre for Europe and the CIS (2006): Guide for Ombudsman Institutions: How to Conduct Investigations. Available at: [http://europeandcis.undp.org/?menu=p\\_cms/show&content\\_id=84474ACE-F203-1EE9-BB59071A724B9348](http://europeandcis.undp.org/?menu=p_cms/show&content_id=84474ACE-F203-1EE9-BB59071A724B9348)

<sup>105</sup> It should be noted, however, that the committees dispense with the requirement of exhaustion of domestic remedies where the only remedies available to the complainant are without suspensive effect, i.e. remedies that do not automatically stay an execution/extradition/deportation order; or when domestic remedies are clearly ineffective.

<sup>106</sup> This is confirmed by decisions of the HRCttee. See, for example: HRCttee (2006): Ms. Susila Manila Dahanayake and 41 other Sri Lankan citizens v Sri Lanka. Communication No. 1331/2004, UN Doc. CCPR/C/87/D/1331/2004, 14 September 2006, para. 6.2; and HRCttee (2004): Madafferri v Australia, Communication No. 1011/2001, UN Doc. CCPR/C/81/D/1011/2001, 26 August 2004, para. 8.4.

cials. NHRIs can invite NGOs and the media to support campaigns for ratification of the Optional Protocols and for making the relevant declarations under art. 22 CAT and art. 14 ICERD. NHRIs can also build on relevant TBs' Concluding Observations that frequently encourage states to agree to the relevant individual complaint mechanisms. In particular, NHRIs can concentrate on explaining the importance of effective remedies for human rights violations at the national and international level for the actual implementation of IHRL.

### The Human Rights Commission of Sri Lanka urges the Sri Lankan government to ratify the ICCPR-OP1

In its Concluding Observations on Sri Lanka, the HRCttee welcomed the state party's ratification of ICCPR-OP1. The Human Rights Commission of Sri Lanka had lobbied for the ratification of the Optional Protocol, and in 2002 it organised a training workshop on the procedure under the ICCPR-OP1 in cooperation with the United Nations Development Programme (UNDP).

Source: HRCttee (2003): Concluding Observations – Sri Lanka. UN Doc. CCPR/CO/79/LKA, 1 December 2003, para. 6.

### Awareness-Raising and Educational Activities

Ignorance of, and lack of awareness about, the existence of complaints procedures, even among lawyers, seriously inhibits their use. This is true in particular for emerging democracies and developing countries. NHRIs can, therefore, organise educational activities and awareness-raising activities on the individual complaints procedures. These may include seminars on the procedures for government officials from relevant state agencies, for lawyers or for NGOs. Information on the procedures could be made available on their websites, and could also be distributed in form of printed material to the interested public and the media. NHRIs could encourage the media to report extensively on a successful case, since this may help to "kick-start" the process. Furthermore, NHRIs can make sure that IHRL (including the purpose and functioning of the individual complaints procedures) is included in the curricula of law schools, Bar and advocates associations and judicial academies in their countries.

### 3.2.2 NHRIs' Role in the Procedures Before the Committees

NHRIs can also become involved in the actual procedures before the relevant UN TBs in various ways. They could assist individuals to file complaints and monitor the implementation of interim measures that may be imposed by TBs in order to avoid irreparable harm to victims of alleged violations.

#### Assisting Individuals to File Complaints

NHRIs can offer support with filing a complaint to a TB to individuals who claim that their rights have been violated and/or their lawyers. At the request of complainants, NHRIs can give advice to individuals on the appropriate treaty body or admissibility of the petition. Where NHRIs have the powers to review individual complaints themselves, they might wish to encourage individuals to use this procedure before they address international institutions, with the view to relieving the caseload of the international and regional bodies. NHRIs may also intervene in domestic human rights litigations that can be informed by human rights principles in the various treaties through submitting amicus briefs or other submissions on the interpretation and application of IHRL. Also, depending on the merits of the complaint, European, American or African NHRIs may suggest individuals to complain instead to regional human rights courts/commissions, such as the European Court of Human Rights,<sup>107</sup> the Inter-American Commission on Human Rights/Inter-American Court of Human Rights,<sup>108</sup> or the African Commission on Human and Peoples' Rights,<sup>109</sup> provided their countries have ratified the relevant regional instruments.

In cases where a complaint to one of the UN TBs seems to be the most promising option to seek redress for an alleged human rights violation, NHRIs can further advise individuals to which of the four TBs the complaint should be sent. NHRIs should then make sure that complaints submitted to UN TBs fulfil all admissibility criteria that were outlined above in chapter 1.3. In certain circumstances, NHRIs may

<sup>107</sup> Under art. 34 of the European Convention on Human Rights individuals who claim to be a victim of a violation of the rights set out in the ECHR or a protocol thereto can send applications to the European Court of Human Rights.

<sup>108</sup> The Inter-American Commission on Human Rights receives, analyses and investigates individual petitions which allege human rights violations, pursuant to articles 44 to 51 of the American Convention of Human Rights. According to art. 61 (2), the Commission can submit a case to the Inter-American Court of Human Rights.

<sup>109</sup> The African Charter for Human and Peoples' Rights provides for an individual complaint mechanism in arts. 55 and 56.

wish to strongly support a specific complaint that is exemplary for systematic violations of particular human rights within their country.

#### Interacting with Treaty Bodies' Special Rapporteurs on New Communications and Interim Measures through the Complainant

With the explicit consent of the complainant and only through him or her, NHRIs can become involved in the interaction between the Special Rapporteur on New Communications and Interim Measures and the complainant. They can, for example, help individuals to submit relevant additional information clarifying the admissibility or the merits of their petitions, when Special Rapporteurs request such information. In some cases, NHRIs themselves might have conducted an investigation into the incidents under consideration which they can make available to the complainant. Since third party or amicus curiae interventions are not generally permitted under the individual complaints procedures, NHRIs cannot directly interact with the Special Rapporteurs, but can provide information through the complainant.

#### Human Rights Committee uses findings of the Swedish Parliamentary Ombudsman in its View on *Mohammed Alzery v Sweden* (Communication No. 1416/2005)

In *Mohammed Alzery v Sweden* the HRCttee found, inter alia, a violation of art. 7 ICCPR (prohibition of torture or cruel, inhuman or degrading treatment or punishment). After having obtained diplomatic assurances that the complainant would not be subjected to torture or cruel, inhuman or degrading treatment or punishment in Egypt, the Swedish government decided to deport the complainant to Egypt. Before the complainant was flown to Cairo, Swedish Security Police handed him over to American and Egyptian security agents who subjected him to what was termed a "security search" at Stockholm-Bromma airport. The foreign security agents cut off the complainant's clothes, took photographs, handcuffed him and chained his feet, gave him some form of tranquilliser and placed him in diapers. He was then dressed in overalls, blindfolded and hooded, and his feet were bare. In the aircraft, the complainant was placed on the floor in an awkward and painful position, with chains restricting further movements. Swedish Security Police did not intervene with the "security search". In Cairo, the complainant was handed over to Egyptian military security.



Substantiating its View, the HRCttee relied heavily on findings of the Swedish Parliamentary Ombudsman who had conducted a thorough investigation into the incidents at Stockholm-Bromma airport. This was possible because the complainant's counsel specifically introduced the Parliamentary Ombudsman's findings in her correspondence with the Committee.

Even before the HRCttee adopted its decision in this case, the Swedish government had already adopted clear guidelines for the enforcement of expulsion orders for aliens in response to the findings of the Parliamentary Ombudsman.

Source: HRCttee (2006): *Mohammed Alzery v Sweden*. Communication No. 1416/2005, UN Doc. CCPR/C/88/D/1416/2005, 10 November 2006.

### Monitoring Compliance with Interim Measures

NHRIs can also play an important role in monitoring the implementation of interim measures that may be imposed by Special Rapporteurs on New Communications and Interim Measures when there is a danger that irreparable harm will be caused to the complainant. An example may be cases that relate to the expulsion or extradition of individuals to countries where they risk to be subjected to torture or other forms of ill-treatment, or where the complainant has been sentenced to death. Under certain conditions, NHRIs can prevent serious human rights violations when they actively plead for the implementation of interim measures by their governments.

### 3.2.3 NHRIs' Role in the Follow-up to Views

With the approval of the complainant, NHRIs can contribute greatly to the actual implementation of UN TBs' Views of petitions which to date remains unsatisfactory.

### Urging the Implementation of Views

As with Concluding Observations, implementation of Views begins with raising the level of awareness about the decisions of UN TBs. NHRIs can translate Views into local languages, publish them on their websites or encourage relevant ministries to publish them on their websites, and communicate the TBs' findings to the media. NHRIs can also make sure that those public authorities which have been directly involved in a specific case or are generally responsible for the implementation of

international decisions are adequately informed about the decisions of relevant committees, and become fully aware of their responsibility to implement them.<sup>110</sup> In certain cases, the implementation of Views may require the changing of national legislation and/or policies.

### The Australian Human Rights and Equal Opportunities Commission (HREOC) relied on jurisprudence of the HRCttee in its finding that 58 federal laws were in breach with Australia's human rights obligations

In 2007, HREOC's Same-Sex Same-Entitlements Inquiry found that 58 federal laws breached the human rights of more than 20,000 same-sex couples in Australia. In its finding, the HREOC relied on the jurisprudence of the HRCttee in two communications from Australia (*Toonen v Australia* and *Young v Australia*), since these cases made clear that the ICCPR prohibits discrimination on the basis of sexual orientation.

The Young case was particularly relevant to the Inquiry because it the HRCttee concludes that a law differentiating between same-sex and opposite-sex de facto couples in accessing financial entitlements generally is a discrimination under art. 26 of the ICCPR.

HREOC's Same-Sex Same-Entitlements Inquiry recommended to the Australian government that omnibus legislation be introduced to remove the 58 discriminatory federal laws.

Source: Authors' correspondence with the President of the Australian Human Rights and Equal Opportunities Commission, The Hon. John von Doussa; HRCttee (1994): *Toonen v Australia*. Communication No 488/1992, UN Doc. CCPR/C/50/D/488/1992, 31 March 1994; HRCttee (2003): *Young v Australia*. Communication No 941/2000, UN Doc. CCPR/C/78/D/941/2000, 6 August 2003.

An NHRI can advise its government on questions of payment of compensation, including on the determination of the quantum of such compensation.<sup>111</sup> NHRIs can

<sup>110</sup> According to art. 2 (3) (a) ICCPR; art. 13 and 14 CAT; art. 6 ICERD.

<sup>111</sup> This is, for example, done by the Human Rights Commission of Sri Lanka on a regular basis. Cf.: HRCttee (2006): Follow-up response by the Government of Sri Lanka to the View *Kankanamge v Sri Lanka*, UN Doc. A/60/40, Vol. II, Annex VII.

also inform parliaments about non-implementation of Views so that parliamentarians can take up the issue if necessary.

NHRIs can also help to make sure that their governments report back, in a satisfactory manner, to the relevant committees on measures taken to implement the committees' Views. Often, follow-up replies to the committees lack the required detail: governments simply provide general information which is not related to the circumstances of a particular petition, and do not address the concrete recommendations of the committees to offer effective remedies to complainants. NHRIs could intervene and urge their government to take these follow-up reporting obligations seriously, and provide the required, sufficiently detailed information to the committees in a timely manner. If necessary, NHRIs might decide to send alternative or supplementary information to TBs, or encourage and assist the complainant in sending such information.<sup>112</sup>

#### Interacting with the Treaty Bodies' Special Rapporteurs for the Follow-up to Views

NHRIs can also consider interacting with Special Rapporteurs for Follow-up to Views with the aim of making governments comply with the decisions of the committees. They can make sure that reminders sent by Special Rapporteurs of the Committees are given due attention by the government. Moreover, when Special Rapporteurs for the Follow-up to Views hold meetings with representatives of states parties or with permanent missions to the UN, NHRIs can support the Special Rapporteurs in their efforts to point out the political costs of non-cooperation to government officials, or to encourage governments to accept technical assistance or advice from OHCHR in implementing the Views. NHRIs can also cooperate with Special Rapporteurs for the Follow-up to Views when they decide to conduct a country visit with the consent of the respective government.<sup>113</sup>

<sup>112</sup> It should be noted, however, that the HRCttee for example does not treat such "alternative or supplementary follow-up information" as official follow-up documentation.

<sup>113</sup> For example, in 1995 the HRCttee's Special Rapporteur for the Follow-up to Views visited Jamaica to discuss the implementation of Views with the Jamaican authorities and the parliamentary ombudsman. Cf.: Report of the Human Rights Committee, Official Records of the General Assembly, Fiftieth Session, Supplement No.40, UN Doc. A/50/40, 8 October 1995, paras. 557–562.

#### Encouraging the Enactment of Enabling Legislation

The lack of enforcement of the committees' Views often prevents victims of human rights violations obtaining monetary compensation or having their former national sentences reviewed when UN TBs have found a violation of provisions of the relevant human rights instruments.

Several countries, among them Colombia, Finland and Spain, have established an effective mechanism that guarantees the implementation of the TBs' Views.<sup>114</sup> They have adopted enabling legislation that gives TBs' Views on petitions a defined status under domestic law, and therefore allows victims to obtain redress through local courts or administrative bodies. Since lack of enforcement at the national level greatly undermines the effectiveness of the individual complaints procedures, NHRIs should strongly encourage their states to enact such enabling legislation. However, NHRIs may meet political resistance when promoting enabling legislation.

#### The Colombian NHRI (Defensor del Pueblo de la República de Colombia) urges the Colombian government to adopt enabling legislation (Law 288) in 1996

Under the Colombian Law 288, victims of human rights violations that have been recognised by the Inter American Commission on Human Rights IACHR or HRCttee can claim monetary compensation from the Colombian government. Compensation is provided when a special Committee of Ministers, composed of the heads of the Ministries of the Interior, Foreign Affairs, Justice and Defence issue a 'favourable view' for compensation after they reviewed the decision of the HRCttee or IACHR. When such 'favourable view' is issued, a conciliation hearing is scheduled between the government and the victim. Once an agreement is reached, it is proved by an administrative tribunal of its legality. The resulting administrative decision is enforceable under Colombian law.

<sup>114</sup> Finland, Spain and Colombia are three of the rare exceptions. Finland allows compensation to be sought before administrative courts on the basis of a finding of a violation by the HRCttee. The ministry responsible for the violation has to pay the compensation in question. See: Niemi, Heli (2003): National Implementation of Findings by United Nations Human Rights Treaty Bodies – A Comparative Study. Institute for Human Rights, Abo Akademi University, p. 52.

If no voluntary agreement on the nature and extent of redress is reached, a competent administrative tribunal can determine the amount to be paid as compensation. If the Committee of Ministers refrains from issuing a 'favourable view', the victim may initiate a hearing within the ordinary administrative court system.

The Colombian NHRI, the Defensor del Pueblo de la República de Colombia, had successfully urged the Colombian government to adopt this enabling legislation from the beginning of the 1990s.

Source: The Colombian Law 288 is reviewed by: Heyns, Christof and Viljoen, Frans, 2002: The Impact of the United Nations Human Rights Treaties on the Domestic Level, The Hague: Kluwer Law

### 3.3 NHRIs' Role in the Inquiry Procedure

The inquiry procedure under art. 20 CAT and art. 8 OP-CEDAW, aiming at investigating and addressing specific, but lasting and systematic violations of provisions of these two conventions, is underutilised. Human rights actors have paid little attention to these procedures. NHRIs could certainly use this procedure more frequently as a means to address systematic human rights violations within their countries. The following paragraphs develop some ideas in this regard, and review information on NHRIs' involvement in inquiry procedures that have been conducted by the CAT and the CEDAW.

#### 3.3.1 NHRIs' Role in Initiating an Inquiry

In order to promote use of inquiry procedures of CAT or CEDAW, NHRIs can, for example, widely publicise the inquiry procedure. They may submit information to a TB regarding an ongoing inquiry or they can encourage NGOs or other actors involved in human rights work to initiate such procedures.

#### Information and Awareness-Raising

As is the case for the state reporting procedure and the individual complaints procedures, there is little knowledge of the inquiry procedures beyond a narrow circle of human rights experts. Providing information about the purpose and function of the inquiry procedures can, therefore, promote greater use of these procedures. NHRIs can use appropriate tools, ranging from printed and online information to

informational seminars for NGOs, interested individuals or government officials. The specific feature of the inquiry procedure that aims at combating specific but systematic human rights violations can in particular be used by (groups of) specialised NGOs.

#### NHRI's Role in the Initiation of an Inquiry Procedure

If their respective governments have accepted the procedure, NHRIs may also consider submitting information that might lead to inquiry procedures themselves, or they might wish to encourage NGOs or other representatives of civil society to initiate these procedures. In particular, they may offer briefings and other information to a TB to provide them with further background on the issues at stake.

NHRIs might be well placed to provide the CAT with reliable information that substantiate "well-founded indications" that torture is "systematically practised" within a state, especially those with a mandate to visit detention facilities, or those that have the power to consider complaints from individuals. NHRIs may also possess information on "grave and systematic" violations of women's rights set out in CEDAW. NHRIs may advise actors who consider initiating an inquiry procedure whether this is the most appropriate tool to respond to systematic human rights violations as this depends on the individual political context in a country.

In any case, NHRIs can assist NGOs to provide the most detailed and relevant information possible to the committees, so that the committees can open an inquiry. With respect to a complaint to CAT, NHRIs can help to make sure that the acts described comply with the definition of torture in art. 1 CAT, since systematic practice of cruel, inhuman or degrading treatment or punishment is not covered by the inquiry procedure under CAT. Ideally, information submitted to CAT should contain a large number of concrete examples of torture. In this context, NHRIs might consider assisting NGOs in collecting the required evidence, or passing their own information on to relevant actors. In cases where NGOs or other actors want to initiate a procedure under CEDAW, NHRIs might help to ensure that the information proves that violations of CEDAW occur in a "grave and systematic" manner within a state.<sup>115</sup>

NHRIs can also give background information to TBs or enable NGOs to give information that relates to possibly relevant facts, for example on any form of systema-

<sup>115</sup> Art. 8 OP-CEDAW.



tic discrimination, a history of ethnic tensions or conflicts, inadequacies in existing legislation, or the court system of a specific country.<sup>116</sup> Especially when the CAT or CEDAW request "additional relevant information" before they invite the state party concerned to cooperate in examination of the information before the committees, NHRIs may seize the opportunity to give further relevant information to the committees.

### 3.3.2 NHRIs' Role During the Inquiry Procedure

After CEDAW or CAT decide to initiate an inquiry and to request the state to cooperate in the procedure, NHRIs can become involved in various ways: they may urge their governments to cooperate with the committee in the context of the procedure, including accepting that members of the committee conduct a country visit. If a state agrees to accept a country visit, NHRIs can provide the relevant committee with information about which government institutions, organisations or individuals the committee members should contact and talk to during their visits, and insist that they themselves are visited by the committee members.

#### Urge Governments to Cooperate with the Committees

If the CAT or CEDAW plan to initiate an inquiry with respect to a certain state party, NHRIs may use their contacts to public officials to convince them of the benefit of cooperation with the committees in the procedure. They may wish to explain the purpose of the whole procedure to officials, and remind them of their obligation to cooperate with the committee, which is a consequence of the state's ratification of OP-CEDAW and CAT. NHRIs may also underline a constructive understanding of the procedure – that of dialogue and cooperation with international experts. Following these arguments, NHRIs may also urge their governments to accept a country visit of several committee members. The advantages of a country visit should be obvious: it will provide more factual knowledge to TB members, give opportunities to discuss structural problems behind alleged violations, and should lead to effective and usable recommendations to the state party.

<sup>116</sup> Joseph, Sarah, et al., (2006): A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies. Geneva: World Organisation against Torture, p. 127.

### Facilitating TB Members Country Visits

When governments have agreed to receive members of the committees in their countries, NHRIs should make sure that they have the opportunity to meet with the committees' representatives. NHRIs should be allowed to have thorough discussions with the committee members. Discussions should enable them to give all relevant information to the committee members. If an NHRI has local offices in a region where human rights violations examined in the inquiry take place, NHRIs should make sure that members of the committees visit these offices as well.

When committee members plan their country visits, NHRIs can also submit suggestions to the committees on which government institutions, NGOs, individuals (including victims of the alleged systematic human rights violations, detainees, lawyers, etc.), and other institutions the committee members should contact and visit during their stay in the respective country. NHRIs may be well placed to make such suggestions, since they mostly have a good overview of the government structures in their country, are familiar with civil society actors including NGOs, and they may have contacts to individuals who have suffered from human rights violations that are the subject of the inquiry procedure.

Moreover, NHRIs can help to make sure that governments accept general principles for a country visit that allow the committee members to carry out their programme of work effectively. Such general principles may include unrestricted access to any places where persons are deprived of their liberty, unrestricted access to any written documents that members of the committees might feel useful to consult, and the possibility to conduct interviews and have private conversations with anybody, including with detainees.

#### During their visit to Mexico, members of CAT met extensively with representatives of the Mexican National Human Rights Commission (CNDH) and visited its district offices in several states

In 1998 the CAT received a report that contained information on systematic practice of torture in Mexico from the Mexican NGO Human Rights Centre Miguel Augustin Pro-Juarez (PRODH) based in Mexico City. The Committee found this information reliable and initiated an inquiry procedure under art. 20 CAT. With the agreement of the government of Mexico, two members of the CAT conducted a country visit to Mexico in August/September 2001.

During their visit, the CAT members met extensively with representatives from the Mexican National Human Rights Commission and its District Human Rights Commissions in several federal states (Distrito Federal, Guerrero, Tamaulipas and Oaxaca). In all of these discussions, the Human Rights Commissions provided the Committee members with all relevant documentation and information: their annual reports; information related to individual cases that have been subject to investigations by the National or District Human Rights Commissions; information related to several main factors that indicated that torture was systematically practised in Mexico, such as inadequately trained police officers and members of the army, impunity of police officers who practise torture, the length of time limits to hand detainees over to a court authority, the use of evidence obtained by torture in the criminal proceedings, lack of independence of medical experts of the Public Prosecutor's Office, etc.

The information provided by the Mexican National and District Human Rights Commissions contributed greatly to the elaboration of CAT's recommendations to the government of Mexico. In its response to the Committee's recommendations, the government of Mexico indicated that it had, among other things, adopted a new policy with regard to the administration of justice that aimed at better implementation of the National and District Human Rights Commissions' recommendations relating to combating and preventing torture.

Source: CAT (2003): Report on Mexico produced by the Committee under art. 20 of the Convention, and Reply from the Government of Mexico. UN Doc. CAT/C/75, 2003.

### 3.3.3 NHRIs' Role in the Implementation of the Committees' Recommendations

When CAT or CEDAW issue recommendations on how states should redress systematic practices of torture or violations of CEDAW in their reports on an inquiry, and the state agrees to the publication of those, NHRIs can engage in supporting the implementation of these recommendations through various activities. In any case though, NHRIs can urge the government to publish the results of the procedure.

#### Informing about Recommendations

Should the government have agreed to the publication, NHRIs may inform the general public about the TBs' recommendations following an inquiry procedure, and

especially engage with government officials and bodies who are addressed by the recommendations. Similar to NHRIs' activities related to the implementation of Concluding Observations discussed above, NHRIs can, for example, organise meetings or roundtable discussions with all relevant actors that play a role in the implementation of the recommendations. Participants may, for example, discuss approaches and policies for implementing the recommendations, and define each actor's responsibility in this process. Compared to Concluding Observations, recommendations issued by the committees in the process of an inquiry procedure are generally more detailed and relate to more concrete, albeit systematic and often widespread, human rights violations within a specific country. Often, several recommendations address specific problems related to practices or omissions of specific government institutions or administrative bodies that cause such violations. In this context, NHRIs should urge these bodies to take the recommendations seriously, and to effect the required changes with due diligence.

#### Follow up Implementation of Recommendations

NHRIs can also monitor their governments' compliance with the TBs' request to inform the committees about measures that have been taken to give effect to the recommendations within a defined period of time. NHRIs can check whether their governments send such information, for example through contacting the Special Rapporteur on art. 20 of the CAT, or by otherwise contacting members of the committees or the secretariat. NHRIs may also wish to give supplementary or alternative information to the Rapporteur on art. 20 CAT or the entire CAT or CEDAW, in cases where the information given by their governments is inadequate. Such information can also be included in reports NHRIs may consider sending to TBs in the context of the next periodic report.

#### Using TBs' Recommendations in NHRIs' Work

In certain situations, NHRIs might use recommendations to underpin demands for the extension of their mandates, for example carrying out regular visits to their country's detention facilities with the aim of preventing torture. An extension of their mandate should then imply an enlargement of their budget.

### The Committee Against Torture's recommendations issued in the context of an inquiry on Peru bring about greater competences for the Defensoría del Pueblo de Perú (Peruvian Ombudsman Office)

After a country visit to Peru by two members of the Committee against Torture in August/September 1998 to verify information before the Committee containing indications that torture was systematically practised in Peru, CAT issued its recommendations to the state party on how to address these human rights violations. It recommended that the Defensoría del Pueblo de Perú "should be given the legal powers and human and material resources necessary for ensuring that every detainee is able to avail himself of it from the time pre-trial detention is ordered."

In response to this recommendation, the Peruvian government restructured the Public Defender system. Among other changes, a Team for the Protection of Human Rights in Police Stations was established within the Ombudsman's Office. The Team has the responsibility to verify situations of detainees in police stations.

Source: CAT (2001): Annual Report of the Committee against Torture. Official Records of the General Assembly, 56th Session, Supplement No. 44, UN Doc. A/56/44, paras. 144–193.

## 3.4 NHRIs' Role Under the Optional Protocol to the Convention Against Torture

As outlined above (in chapter 1.5), OP-CAT offers new opportunities for cooperation between international and national bodies to prevent torture and other forms of cruel, inhuman or degrading treatment or punishment at the domestic level, including for cooperation between existing NHRIs and the newly established Subcommittee on Prevention. In the following, various activities that NHRIs can undertake to encourage ratification and implementation of OP-CAT are discussed. As OP-CAT ranks among the international human rights instruments that have been adopted only very recently, relatively little information on NHRIs' activities related to OP-CAT is so far available. Therefore, the following sections rather outline some approaches NHRIs might reasonably take to encourage the ratification and implementation of OP-CAT in the near future. Approaches discussed here are by no means exhaustive.

### 3.4.1 NHRIs' Role in Promoting Ratification of OP-CAT

NHRIs have an important role to play in encouraging and pressurising their states to sign and ratify OP-CAT. To this end, they can engage in a wide range of activities.

#### Conducting Research into the Legal and Factual Situation in Places of Detention

If NHRIs want to start a successful advocacy campaign for the ratification of OP-CAT, it is an essential precondition that they possess a good overview of the legal and factual situations in differing places where people are deprived of their liberty. Research should cover the existing legal regimes that are applicable to various places where people are deprived of their liberty, such as police stations, remand centres, prisons, military prisons, juvenile prisons, centres of detention for illegal migrants and asylum seekers, psychiatric institutions, closed institutions for minors, elderly people's homes, and others, depending on the context of a particular country. Research should also identify possible structural problems that occur or are likely to occur with regard to torture or other forms of ill-treatment, and identify and evaluate existing monitoring mechanisms and complaint procedures in places of detention. Such analysis can serve as a basis for an advocacy campaign for the ratification of OP-CAT, since it may substantiate the necessity for the establishment or designation of an NPM in order to prevent torture and other forms of ill-treatment within a specific country. Baseline research on the factual situations in places of detention can also identify gaps in the availability of empirical data and therefore stimulate further research in this context.

#### Advocacy Campaigns for the Ratification of OP-CAT

On the basis of their knowledge about the legal and factual situation in places where people are deprived of their liberty, NHRIs can start an advocacy campaign for the ratification of OP-CAT, as the case may be in cooperation with interested NGOs. Various activities can be undertaken within the context of such an advocacy campaign.<sup>117</sup>

<sup>117</sup> Strategies for NHRIs to effect the ratification and implementation of OP-CAT discussed in this and the following section are mainly based on suggestions of the Inter-American Institute of Human Rights (I/IHR) and the Association for the Prevention of Torture (APT). See: Inter-American Institute of Human Rights/Association for the Prevention of Torture (2004): Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment – A Manual for Prevention, Lyon: Imprimerie Rhodaneinne; especially Chapter V, "Strategies for the Ratification and Implementation of the Optional Protocol to the UN Convention against Torture", p. 141–164.

NHRIs can conduct awareness-raising campaigns about the purpose of OP-CAT among the legislative and executive branch and other public authorities. In the context of such a campaign, NHRIs can identify parliamentarians from national and regional parliaments who are open for the cause of human rights, such as members of parliamentary human rights committees or committees on foreign affairs, and encourage them to argue for the ratification of OP-CAT. For example, they can urge these committees to initiate a hearing on torture prevention in the respective country, during which specific structural problems can be discussed openly.

With regard to the executive branch, NHRIs may contact relevant ministries, such as the ministry of justice and the ministry of foreign affairs, that may help to convince the government to ratify OP-CAT. In addition, NHRIs may identify departments within the executive that are likely to play a role in designating or establishing one or several NPMs, and encourage them to support the ratification of OP-CAT.

NHRIs can provide print, radio and TV reporters with arguments supporting the ratification of OP-CAT and encourage them to present these arguments to the general public and public authorities. This may stimulate a broad debate about OP-CAT and how it can help to shape and put into operation national policies for the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment. NHRIs can also make sure that the debate is an inclusive one that reaches all relevant actors, including prison authorities, police officials, migration officials, judicial personnel, staff working in closed institutions for minors or in elderly people's homes, to name but a few. Meetings with different stakeholders may also help the NHRI to refine their advocacy strategy.

NHRIs may also consider producing and disseminating materials that support their advocacy campaigns, containing more detailed information about the background, purpose and reach of OP-CAT. Furthermore, within the framework of a broad advocacy campaign, NHRIs can hold seminars, roundtable discussions, lectures, press conferences and other events with the aim of generating broad support for the ratification of OP-CAT. Such events can be organised together with NGOs, and should encourage the participation of all relevant actors.

### **The South African Human Rights Commission (SAHRC) and the Association for the Prevention of Torture (APT) hold roundtable discussions on a plan of action that will lead to the ratification and implementation of OP-CAT in South Africa**

In April 2006, SAHRC and the Swiss-based NGO APT held roundtable discussions on OP-CAT in Johannesburg, South Africa. The meeting was convened as a means to open a national dialogue on the ratification and implementation of OP-CAT in South Africa. The report on the meeting lists the following objectives of the discussions:

- "to share information on OP-CAT among relevant governmental, institutional and non-governmental stakeholders;
- to assess the process of ratification of the OP-CAT by the South African government;
- to examine the implications for South Africa of the OP-CAT ratification;
- and to consider and reflect on the future implementation of the Protocol in South Africa."

As a result of the roundtable discussions, SAHRC considered undertaking several activities with the aim of effecting ratification and implementation of OP-CAT in South Africa: a review of the legal and factual situation in all places of detention in South Africa; the establishment of an Ad-hoc Committee on Torture with a mandate to lobby for the ratification of OP-CAT in South Africa and the criminalisation of torture in South African law, comprised of relevant actors such as members of the legislature, civil society organisations, government officials and existing visiting mechanisms; the dissemination of information about CAT and OP-CAT to all relevant actors, including to neighbouring countries; and addressing the conditions of detention of asylum seekers with appropriate means as a priority.

Source: SAHRC/APT (2006): Report on the Roundtable Discussion on the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, April 2006. Available at: [http://www.sahrc.org.za/sahrc\\_cms/downloads/OPCAT%20Roundtable%20Discussions%20Report.pdf](http://www.sahrc.org.za/sahrc_cms/downloads/OPCAT%20Roundtable%20Discussions%20Report.pdf)

NHRIs can also try to involve international actors and organisations such as the Human Rights Council's Special Rapporteur on Torture, the ICRC, and regional organisations into their advocacy campaign directed at the ratification of OP-CAT. NHRIs in developing countries can, for example, contact organisations involved in the implementation of development projects, such as UNDP. UNDP frequently imple-

ments projects that aim to initiate security sector reform and promote greater democratic oversight of the security sector.<sup>118</sup> Such projects can profit from a debate about the ratification and implementation of OP-CAT.

When ratification of OP-CAT is discussed at the national level, this can also include a debate about the possible shape, function and competences of an NPM, since in reality debates about ratification and implementation of OP-CAT will not be completely separate. NHRIs' role in this debate is discussed below.

### 3.4.2 NHRI's Role in the Implementation of OP-CAT

After a state has ratified OP-CAT, NHRIs will promote its actual implementation. This may include involvement in the discussion about the possible form, function and mandate of one or several NPMs; supportive activities in the actual establishment or designation of NPMs; and contributions to the implementation of the recommendations of the NPMs and the Subcommittee on Prevention once they start operating. Some NHRIs will take on the function of the NPM themselves.

#### Discussing Form and Mandate of NPM

The most important aim of NHRIs in the debate on the establishment of an NPM in their country is to make sure that the NPM conforms to the legal and operational requirements set out in OP-CAT. These requirements have been summarised above (see chapter 1.5).

In the context of a debate on the form and mandate of NPMs, NHRIs should ensure that existing monitoring schemes for places of detention are analysed carefully. Their legal basis, mandates and practices must be evaluated with regard to their conformity with the requirements set out in OP-CAT. Existing mechanisms to be reviewed include visiting schemes operated by NGOs, existing judicial offices, independent boards of visitors and parliamentary committees. In countries where NHRIs have the competence to visit places of detention, this mechanism should be included in the review as well.

<sup>118</sup> Among projects carried out under UNDP's Sub-Practice "Crisis Prevention and Recovery", UNDP promotes justice and security sector reform in various countries. For more information see: [http://www.undp.org/bcpr/we\\_do/security\\_reform.shtml](http://www.undp.org/bcpr/we_do/security_reform.shtml).

Results of the review form the basis of the debate: it will reveal whether it is necessary to establish a new NPM or whether existing monitoring mechanisms can reorient their work in light of OP-CAT. In federal states the question must be addressed of whether the NPM should be a loose association of several regional bodies, whether there should be a centralised body, or whether something in-between might be most suitable in a given national context. NHRIs can then contribute to an active involvement and consultation of relevant stakeholders into the process of the establishment or designation of a NPM.

NHRIs should also make sure that NPMs in their country have the right to interact with the Subcommittee on Prevention without restrictions, and encourage such cooperation once the NPMs and the Subcommittee take up their work. In addition, NHRIs can ensure that the NPMs have a realistic budget available to operate effectively. Where it is designated to act as an NPM itself, the NHRI's own budget must be increased, and its founding instruments may have to be modified since its mandate would include new responsibilities.

#### Role of NHRIs in the Establishment/Designation of NPMs

After a decision on the shape and mandate of one or several NPMs has been made, NHRIs can actively support the operation of these NPMs. They may, for example, support NPMs in developing their working methods, and advise them on determining the frequency of visits to different places of detention. NHRIs may also provide or organise training for the designated members of NPMs, since the effectiveness of a monitoring mechanism largely depends on the professionalism of the visitors.

To date, among the NPMs that have been established already, are some NHRIs accredited according to the Paris Principles. The models chosen for those NPMs differ strongly – in the case of Mexico the National Human Rights Commission was nominated as the NPM, in the case of New Zealand the Human Rights Commission was designated to serve as the central NPM in cooperation with four other agencies.<sup>119</sup>

<sup>119</sup> Association for the Prevention of Torture (APT) (2007): National Preventive Mechanisms – Country-by-Country Status Report. Version of November 22, 2007, see [http://www.aprt.ch/index.php?option=com\\_content&task=view&id=44&Itemid=84](http://www.aprt.ch/index.php?option=com_content&task=view&id=44&Itemid=84)

## Supporting the Work of NPMs and the Subcommittee on Prevention

As soon as NPMs and the Subcommittee start to carry out their visits regularly, NHRIs can once again exercise a monitoring function of the mechanism and, as the case may be, report to CAT on the possible causes in the framework of the reporting cycle. A potential obstacle may be the confidentiality of the procedures – NHRI may encourage publication of the Subcommittee's reports though.

NHRIs may as well play a role in supporting the implementation of the NPM's or the Subcommittee's recommendations. They may, for example, advise relevant authorities on developing strategies for the implementation of recommendations. In cases where states are reluctant to implement recommendations of the Subcommittee on Prevention, NHRIs will have the opportunity to encourage the Subcommittee to conduct follow-up visits to relevant places of detention. The Subcommittee has such possibilities under art. 13 (4) OP-CAT. A specific strategy to support the implementation may be training on international human rights standards on the prevention of torture and other forms of ill-treatment for police officers, officials working in detention facilities, the military, or other officials concerned.

## 3.5 NHRIs' Role in Promoting Recent International Human Rights Treaties

The CRPD aims to ensure visibility of disability issues within the international and national system for the promotion and protection of human rights, and in national and international politics in general. The ICPED intends to close gaps in IHRL of the protection and prevention of all persons from enforced disappearance. NHRIs can play an important role in promoting the visibility of disability issues and in closing the protection gaps regarding enforced disappearances by engaging in activities that support a speedy ratification and implementation of the CRPD and the ICPED.

### 3.5.1 NHRIs' Role in Promoting Ratification of CRPD and ICPED

To date, the CRPD has been signed by a considerable number of states, but was only ratified by a few, the same is true for its Optional Protocol.<sup>120</sup> It will enter into force

after the 20th ratification. The ICPED has been signed by a number of states as well, will only enter into force after the 20th ratification though, too.<sup>121</sup> NHRIs can, therefore, reasonably engage in activities that aim at the ratification of the CRPD, its Optional Protocol and the ICPED, so that these instruments can enter into force as soon as possible. Such activities might be similar to those that were discussed above with regard to the ratification of OP-CAT.

## Conducting Research into the Situation of Persons with Disabilities and Enforced Disappearances

A number of NHRIs in all world regions have built up sound expertise in the field of human rights of persons with disabilities already as they contributed substantially to the development of the CRPD.

To prepare ratification of CRPD, NHRIs can conduct research into the factual and legal situation of disabled persons and identify areas where persons with disabilities are discriminated against and cannot enjoy their rights on an equal basis with others. Within the context of such research, NHRIs should also make sure that they clearly point out what new focus and added value the adoption of a human rights approach to disability issues will bring about for the well-being of disabled persons and society as a whole.

Such research, probably undertaken in cooperation with specialized NGOs and interest groups, would serve as an excellent foundation for advocacy campaigns for the Convention and its Optional Protocol.

Regarding the ICPED, NHRIs can analyse their country's laws on whether they contain sufficient protection of all persons from enforced disappearance, as set out in the ICPED, explore a potentially existing dimensions of forced disappearances in their country and identify protection gaps. Such research will allow NHRIs to substantiate the necessity for the ratification and implementation of ICPED. Ratification of the ICPED can make a significant contribution to prevent the serious human rights violation of enforced disappearance that does not only cause harm to the disappeared person, but also to relatives, friends and often to the whole society.

<sup>120</sup> For a constantly updated status of ratification of the Convention and its Optional Protocol see: <http://www.un.org/esa/socdev/enable>

<sup>121</sup> See: [http://www.bayefsky.com/html/enforced\\_ratif\\_table.php](http://www.bayefsky.com/html/enforced_ratif_table.php)



### 3.5.2 NHRIs' Role in the Implementation of CRPD and ICPED

After their state has ratified CRPD and ICPED, NHRIs can start to undertake activities that aim at the further promotion and actual implementation of CRPD and ICPED.

#### Explaining the overarching aims and basic concepts of CRPD and ICPED

It is an essential precondition for the effective implementation of CRPD that its overarching aims and basic concepts are well understood by the authorities responsible for its implementation. NHRIs can therefore provide training on this new convention and explain the CRPD's human rights approach to disability issues: instead of, once again, addressing disability as a mere medical, charity, or social welfare issue, the convention promotes the recognition of diversity; the principles of non-discrimination, participation and inclusion; individual autonomy and self-determination; equality of opportunities for persons with disabilities; and accessibility of infrastructure, communication services and other facilities. Most societies are far from understanding and much further from implementing this innovative concept. Through interaction with relevant authorities and other institutions with special responsibility for persons with disabilities, NHRIs can make sure that necessary legislative and policy changes are made to guarantee compatibility of national legislation and policies with CRPD. NHRIs may assist in identifying the necessities for change, and pointing out means to effect such change. This might include assisting relevant authorities in collecting "appropriate information, including statistical and research data" that enables states to formulate and implement policies to give effect to CRPD.<sup>122</sup>

As regards the ICPED, it is of great importance that NHRIs promote the criminalisation of enforced disappearance under national legislation. In order to guarantee the prevention of enforced disappearances, NHRIs shall make sure that the ICPED's strict requirements to all situations in which persons are deprived of their liberty are included into national law. Also, the ICPED's broad view of who is a victim of an enforced disappearance shall be introduced in national legislation, as well as the victims' rights to obtain reparation and prompt, fair and adequate compensation. NHRIs may also urge for the adoption of legislation that determines the legal situation of a disappeared person whose fate has not been clarified. Such clarification may spare relatives of missing persons from additional difficulties.

<sup>122</sup> Art. 31 (1) CRPD.

### Discussing the Implementation of art. 33 (2) CRPD

The implementation of art. 33 (2) CRPD might be of particular importance for NHRIs. Under this Article, NHRIs might be given the explicit mandate to "promote, protect and monitor" the implementation of CRPD. This would include various channels of interaction with the yet to be established Committee on the Rights of Persons with Disabilities, similar to the interaction between NHRIs and existing TBs that has been discussed in previous sections.

But it is not necessarily existing NHRIs that are to take on the activities spelled out in art. 33 (2) CRPD. Depending on their administrative and legal systems, states may also establish new bodies that are specifically responsible for promoting, protecting and monitoring the implementation of the CRPD. Therefore, regarding the implementation of art. 33 (2) CRPD, NHRIs can initiate and provide input into a discussion about the most suitable way to monitor the implementation of CRPD in a given national context. This may include the elaboration on the advantages and disadvantages of establishing a new body solely responsible for monitoring the implementation of CRPD, or integrating such a monitoring function into an existing NHRI. For example, the establishment of a separate body might attract more funding and might be able to specialise to a greater extent on disability issues. Extending the mandate of an existing NHRI to cover CRPD might, however, better guarantee that disability becomes an integral part of the general human rights framework within a specific country.

#### Preparing cooperation with the Committee on Enforced Disappearances

Art. 28 (1) ICPED refers to "all relevant state institutions agencies or offices working towards the protection of all persons against enforced disappearances" and calls on the Committee to cooperate with these. While this is not a provision shaping a special monitoring institution for the ICPED at the national level, it may still inspire NHRIs to prepare an overview on who these institutions are in their respective country and to reflect on adequate modalities of cooperation between these institutions, the Committee and the NHRI itself.

## 4 Conclusion: Towards Greater Cooperation Between NHRIs and UN Treaty Bodies

As underlined by the UNHCHR, the effectiveness of the treaty body system must be assessed by the extent of national implementation of recommendations.<sup>123</sup> The analysis in chapter 3 should have shown that, at least for those countries that have a NHRI according to the Paris Principles – and their number is growing – systematic cooperation between the NHRI with TBs bears a real potential to improve the human rights situation of rights holders – in regard to questions as different as the right to health, the right to a fair trial or the right to equal access to both of them.

NHRIs and TBs have, as the examples in chapter 3 show, begun to cooperate in respect to different TB mechanisms. NHRIs are aware that they still have to learn about TB mechanisms and procedures, but they are committed to undertake the steps required to improve co-operation with treaty bodies. They also intend to learn more on related issues such as the functioning of treaty bodies, harmonisation of national legislation with international human rights standards or the interaction with TBs within the reporting cycle.

On another level, NHRIs and TBs have also sought opportunities to discuss further perspectives of closer collaboration. Representatives of the ICC were invited to the Inter-Committee Meetings and Meetings of Chairpersons of TBs, and in late 2006 the OHCHR, the German and the Danish Institutes for Human Rights hosted a roundtable on the role of NHRIs and TBs. The roundtable concluded with a set of recommendations to NHRIs ("Action Points") and to TBs ("Draft Harmonized Approach") to improve and broaden their cooperation.<sup>124</sup> This document serves as a basis for

<sup>123</sup> UNHCHR's Concept Paper: OHCHR (2006): Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body. UN Doc. HRI/MC/2006/2, 22 March 2006, para 4.

<sup>124</sup> 6th Inter-Committee Meeting / 19th Meeting of Chairpersons of the Human Rights Treaty Bodies (2007): Conclusions of the International Roundtable on the Role of National Human Rights Institutions and Treaty Bodies. UN Doc. HRI/MC/2007/3, 12 January 2007.

further discussions between TBs and NHRIs and was endorsed by a Workshop of National Human Rights Institutions and Treaty Bodies in Geneva in November 2007.<sup>125</sup>

At the occasion of the 6th Inter-Committee Meeting of TB members in 2007, the ICC submitted three requests to TBs and asked them to take these up in their debates on a harmonised TB system:

### Recognition of NHRIs as independent actors

This handbook should have made sufficiently clear that NHRIs already play an interesting role and have the potential to play a much bigger one in bringing forward the implementation of human rights treaties at the national level through their interaction with TBs and the follow up to TBs' recommendations. However, NHRIs can only unfold their distinguished role to the full extent if all actors concerned recognise it: NHRIs themselves can seize many more opportunities to relate to TBs and TBs can interact on many more levels with NHRIs than they currently do. In addition, other actors should recognise NHRIs' role, such as UNDP and other development agencies, but also to actors like UNICEF or UNIFEM, and many intergovernmental and non-governmental institutions involved in the implementation of international human rights law.

### Communication/Transparency

NHRIs need information that is easily accessible and transparent, on how to interact and cooperate with the UN treaty bodies. An informative website, guidelines or other information instruments would help NHRIs to approach TBs on different matters in a qualified and effective fashion. A clear entry point for NHRIs would serve the same purpose. An improved and systematic exchange of information between NHRIs and UN TBs would keep NHRIs constantly informed about all aspects of the TBs' work and vice versa. Both levels would benefit from enhanced communication with each other: TB recommendations support and inspire NHRI working priorities, NHRI feedback may help TBs to refine and adjust their advice to states parties.

<sup>125</sup> OHCHR: Workshop of National Human Rights Institutions and Treaty Bodies, Geneva, 26–28 November 2007, Conclusions, on file with authors.



## Harmonisation of TB working methods

While closer collaboration between TBs and NHRIs will certainly make a difference, NHRIs as stakeholders of the different TB mechanisms do have an interest in structural adjustments among TBs and a harmonised approach to their procedures. For NHRIs any harmonisation of working methods of TBs regarding their approach to NHRIs will be most welcome. Common guidelines by all TBs for interaction with NHRIs would be particularly helpful – on all areas of cooperation: the steps of the states reporting process, the individual complaints procedures, the inquiry procedures, and for any special areas of common concern as for example for the cooperation with the Subcommittee on Prevention established under OP-CAT.

These requests have been received with appreciation by TB members and the coming years will most probably bring both levels closer to each other. Enhanced cooperation will help to integrate national and international mechanisms for the promotion and protection of human rights and address many problems of the current system, such as information and coordination gaps, and inadequate follow-up procedures. It will also expand the likelihood that NHRIs make the UN TB system better known at the national level. States parties, too, recognize the role of their NHRI and promote their active participation in the reporting cycle and with regard to other TB mechanisms.

TBs and NHRIs, in cooperation with partners such as the OHCHR, keep an ongoing dialogue on the best means to achieve enhanced implementation, better visibility of human rights guarantees and smooth coordination among key actors. This handbook seeks to promote and provide fresh input into this discussion.

## List of Acronyms

APT	Association for the Prevention of Torture
CAT	Committee Against Torture / Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Committee on the Elimination of Discrimination against Women / Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHRC	Canadian Human Rights Commission
CMW	Committee on Migrant Workers
CNDH	Mexican National Human Rights Commission
CoE	Council of Europe
CRC	Committee on the Rights of the Child / Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council (UN)
ECtHR	European Court on Human Rights
EU	European Union
GIHR	German Institute for Human Rights
HRC	Human Rights Council (UN)
HRCttee	Human Rights Committee (UN)
HREOC	Human Rights and Equal Opportunities Commission (Australia)

IACHR	Inter-American Commission on Human Rights
ICC	International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICCPR-OP1	Optional Protocol to the International Covenant on Civil and Political Rights
ICCPR-OP2	Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICM	Inter-Committee Meeting
ICPED	International Convention for the Protection of all Persons from Enforced Disappearance
ICRC	International Committee of the Red Cross
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
IHL	International Humanitarian Law
IHRC	Irish Human Rights Commission
IHRL	International Human Rights Law
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
NPM	National Preventive Mechanism
OHCHR	Office of the United Nations High Commissioner for Human Rights
OP-CAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OP-CEDAW	Optional Protocol to the Convention on the Elimination of Discrimination against Women
OP-CRC-AC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
OP-CRC-SC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

SAHRC	South African Human Rights Commission
SUHAKAM	Human Rights Commission of Malaysia
TB	United Nations Human Rights Treaty Body
UN	United Nations
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
UNHCHR	United Nations High Commissioner for Human Rights
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women

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## Recommended Websites

**National Human Rights Institutions Forum:**

<http://www.nhri.net/>

**The Asia Pacific Forum of National Human Rights Institutions:**

<http://www.asiapacificforum.net/>

**Human Rights Treaty Bodies Website:**

<http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>

**The UN Human Rights Treaties and Documents of the UN Human Rights Treaty Bodies:**

<http://www.bayefsky.com/>

**UN Enable: Rights and Dignity of Persons with Disabilities:**

<http://www.un.org/disabilities/>

**Association for the Prevention of Torture:**

<http://www.ap.t.ch/>

